INTERIM REGULATORY REFORM ACT OF 1977

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 263

TO PROVIDE FOR INTERIM REGULATORY REFORM AS TO CERTAIN INDEPENDENT REGULATORY AGENCIES

APRIL 4, 1977

Serial No. 95-14

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Committee on Commerce, Science, and Transportation

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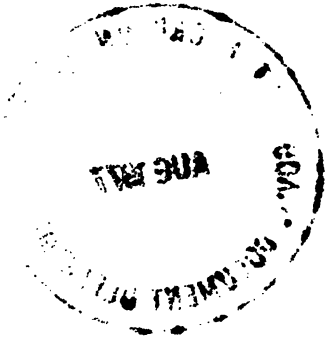

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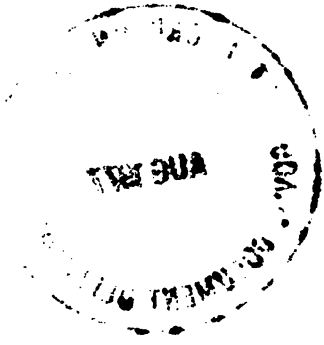

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ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

INTERIM REGULATORY REFORM ACT OF 1977

MONDAY, APRIL 4, 1977

U. S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION,
Washington, D.C.

The committee met at 10:15 a.m. in room 235 of the Russell Senate Office Building; Hon. Wendell H. Ford presiding.

OPENING STATEMENT BY SENATOR FORD

Senator FORD. Good morning, ladies and gentlemen.

I apologize for being late. It was one of those unfortunate things I couldn't prevent.

Our hearing this morning is to consider S. 263, the Interim Regulatory Reform Act.

This legislation is similar to S. 3308 of the 94th Congress which was introduced by Senator Pearson and subsequently reported by this committee and passed by the Senate in May 1976.

We will hear testimony this morning from the seven independent regulatory agencies which are affected by the bill. In brief, the bill:

(1) Requires the periodic review, updating and systematic recodification of the rules promulgated by the agencies;

(2) requires that each agency prepare and submit to the Congress a proposed modernization, revision and codification of the laws and other authorities administered by it;

(3) requires that agencies consider petitions in a timely manner;

(4) grants congressional access to certain information, including budgetary and legislative recommendations;

(5) establishes a method for developing litigating capability in cooperation with the Department of Justice;

(6) extends Federal protection to officers of the agencies in the performance of their duties;

(7) requires that former Commissioners and members of the agencies avoid the appearance of conflict of interest;

(8) makes the agencies more accountable for their actions and inactions;

(9) makes the appointment of agency chairmen subject to advice and consent of the Senate; and

(10) requires periodic oversight and reauthorization of appropriations every 3 years.

I note with some irony the failure of some of the agencies to submit their testimony 48 hours in advance of the hearing as was requested by Chairman Magnuson. I have been told that in at least

Staff members assigned to this hearing: Edward Merlis and Stephen McGregor.

one case it was because the Office of Management and Budget had not yet "cleared" the statements. Perhaps that is reason in and of itself for us to enact the fourth provision which I mentioned earlier in my statement.

We have a limited amount of time available this morning, and so I would ask each witness to submit his statement in full for the record and summarize the statement in the oral presentation.

We will proceed in the order in which the seven agencies were established, beginning with the Interstate Commerce Commission (ICC).

That is leaving me wide open too. Sometimes your oral presentations are longer than the printed statements.

[The bill and agency comments follow:]

95TH CONGRESS
1ST SESSION

S. 263

IN THE SENATE OF THE UNITED STATES

JANUARY 14, 1977

Mr. PEARSON (for himself and Mr. MAGNUSON) introduced the following bill; which was read twice and referred to the Committee on Commerce

A BILL

To provide for interim regulatory reform as to certain independent regulatory agencies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Interim Regulatory Reform Act of 1977".

SEC. 2. FINDINGS.

The Congress finds that interim regulatory reform is needed now with respect to the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Maritime Commission, and the Consumer Product Safety Commission. Each of

these regulatory agencies is required by law to be "independent". The Congress finds that the public interest in their effectiveness and independence—

(1) requires the periodic review, updating, and systematic recodification of the rules promulgated by such agencies;

(2) would be served by directing each such agency to prepare and submit to the Congress a proposed modernization, revision, and codification of the laws and other authorities administered by it;

(3) would be served by assuring that such agencies in fact consider, in a timely manner, certain petitions;

(4) requires that the Congress, in the execution of its constitutional responsibility, have access to certain materials and documents controlled by such agencies;

(5) would be advanced by authorizing such agencies to develop and apply, in cooperation with the Department of Justice, direct litigating capability in certain cases;

(6) would be furthered by extending Federal protection to officers of such agencies;

(7) requires that former Commissioners and members of such agencies avoid the appearance of conflict of interest;

(8) would be furthered by making such agencies

more fully accountable for their actions and inactions;

(9) would be better served if the Chairman of each such agency were appointed by the President, by and with the advice and consent of the Senate, for a fixed term of office as Chairman; and

(10) requires periodic congressional oversight of the activities of each such agency and the authorization of appropriations for each such agency for a period not to exceed 3 years.

The Congress further finds and declares that the authorities described in paragraphs (2) through (10) have already been granted or provided for, by statute, with respect to one or more of such agencies. Rights and duties of such character should apply equally with respect to each such agency.

SEC. 3. RULES RECODIFICATION.

(a) Section 20 of the Federal Trade Commission Act (15 U.S.C. 57c) is amended (1) by inserting "(a)" immediately before the first sentence thereof; and (2) by inserting at the end thereof the following new subsection:

"(C) (1) Within 360 days after the date of enactment of this subsection, the Chairman of the Federal Trade Commission shall develop, prepare, and submit to the Congress and to the Administrative Conference of the United States an initial proposal setting forth a recodification of all of the rules which such Commission has issued and which are in

effect or proposed, as of the date of such submission. Each such recodification proposal shall, to the extent practicable and appropriate—

"(A) recommend the transfer, consolidation, modification, and deletion of particular rules and portions thereof, including reasons therefor;

"(B) recommend changes and modifications in the organization of such rules and in the technical presentation and structure thereof; and

"(C) be designed to coordinate, to make more undestandable, and to modernize such rules in order to facilitate effective and fair administration thereof.

Each such submission shall include the text of such rules, as proposed to be recodified, in their entirety; a comparative text of the proposed changes in existing rules; and explanatory and supporting statements and materials. The rules, as proposed to be recodified, shall not be at variance, in any substantive respect, with the text of the rules of the Federal Trade Commission which are in effect or proposed as of the date of such submission.

"(2) Within 480 days after the date of enactment of this subsection, the Administrative Conference of the United States shall submit to the Congress and to the Federal Trade Commission its comments on each initial proposal submitted

under paragraph (1), together with any recommendations and other material which it considers appropriate.

"(3) Within 570 days after the date of enactment of this subsection, the Chairman of the Federal Trade Commission shall develop, prepare, and submit to the Congress, in accordance with the requirements described in paragraph (1), a final proposal setting forth a recodification of all of the rules which such agency has issued and which are in effect or proposed, as of the date of such submission. Such submission shall reflect (1) evaluation of the recommendations and comments received under paragraph (2) and from any other source; and (2) the results of additional study and review by such agency and its employees and consultants. Such rules shall take effect 90 days after the date of submission of such final proposal.

"(4) Each duly authorized committee of the Congress shall, in the exercise of its oversight responsibility, examine, study, and take other appropriate action with respect to each initial and final proposal submitted to the Congress and referred to such committee.

"(5) The text of each initial proposal submitted under paragraph (1), and of each final proposal submitted under paragraph (3), shall be published in the Federal Register pursuant to section 553 of title 5, United States Code, and

written comments thereon shall be invited. Any rule issued by the Federal Trade Commission which is not included in the recodified rules which take effect pursuant to paragraph (3), by the time required, shall be of no force and effect after such date. The provisions of chapter 7 of title 5, United States Code, shall apply to rules repromulgated under this subsection.

"(6) As used in this subsection, the term "rule" means the whole or a part of a statement of general or particular applicability which is issued or promulgated by the Federal Trade Commission for future effect and which is designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice requirements of such Commission, including, but not limited to, regulations, the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, any general statement of policy, and any determination, directive, authorization, requirement, designation, or similar such action. The term does not include any order, as such term is defined in section 551(6) of title 5, United States Code.".

(b) Title IV of the Communications Act of 1934 (47 U.S.C. 401–416) is amended by adding at the end thereof the following new section:

"SEC. 417 (a) Within 360 days after the date of enactment of this section, the Chairman of the Federal Communications Commission shall develop, prepare, and submit to the Congress and to the Administrative Conference of the United States an initial proposal setting forth a recodification of all of the rules which such Commission has issued and which are in effect or proposed, as of the date of such submission. Each such recodification proposal shall, to the extent practicable and appropriate—

"(1) recommend the transfer, consolidation, modification, and deletion of particular rules and portions thereof, including reasons therefor;

"(2) recommend changes and modifications in the organization of such rules and in the technical presentation and structure thereof; and

"(3) be designed to coordinate, to make more understandable, and to modernize such rules in order to facilitate effective and fair administration thereof.

Each such submission shall include the text of such rules, as proposed to be recodified, in their entirety; a comparative text of the proposed changes in existing rules; and explanatory and supporting statements and materials. The rules, as proposed to be recodified, shall not be at variance, in any substantive respect, with the text of the rules of the Federal

Communications Commission which are in effect or proposed as of the date of such submission.

"(b) Within 480 days after the date of enactment of this section, the Administrative Conference of the United States shall submit to the Congress and to the Federal Communications Commission its comments on each initial proposal submitted under paragraph (1), together with any recommendations and other material which it considers appropriate.

"(c) Within 570 days after the date of enactment of this section, the Chairman of the Federal Communications Commission shall develop, prepare, and submit to the Congress, in accordance with the requirements described in subsection (a), a final proposal setting forth a recodification of all of the rules which such agency has issued and which are in effect or proposed, as of the date of such submission. Such submission shall reflect (1) evaluation of the recommendations and comments received under paragraph (2) and from any other source; and (2) the results of additional study and review by such agency and its employees and consultants. Such rules shall take effect 90 days after the date of submission of such final proposal.

"(d) Each duly authorized committee of the Congress shall, in the exercise of its oversight responsibility, examine, study, and take other appropriate action with respect to each

initial and final proposal submitted to the Congress and referred to such committee.

"(e) The text of each initial proposal submitted under subsection (a), and of each final proposal submitted under subsection (c), shall be published in the Federal Register pursuant to section 553 of title 5, United States Code, and written comments thereon shall be invited. Any rule issued by the Federal Communications Commission which is not included in the recodified rules which take effect pursuant to subsection (c), by the time required, shall be of no force and effect after such date. The provisions of chapter 7 of title 5, United States Code, shall apply to rules repromulgated under this subsection.

"(f) As used in this section, the term "rule" means the whole or a part of a statement of general or particular applicability which is issued or promulgated by the Federal Communications Commission for future effect and which is designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice requirements of such Commission, including, but not limited to, regulations, the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, any general

statement of policy, and any determination, directive, authorization, requirement, designation, or similar such action. The term does not include any order, as such term is defined in section 551(6) of title 5, United States Code.".

(c) Section 29 of the Federal Power Act (16 U.S.C. 823) is amended (1) by inserting "(a)" immediately before the first sentence thereof; and (2) by adding at the end thereof the following new subsection:

"(b) (1) Within 360 days after the date of enactment of this subsection, the Chairman of the Federal Power Commission shall develop, prepare, and submit to the Congress and to the Administrative Conference of the United States an initial proposal setting forth a recodification of all of the rules which such Commission has issued and which are in effect or proposed, as of the date of such submission. Each such recodification proposal shall, to the extent praticable and appropriate—

"(A) recommend the transfer, consolidation, modification, and deletion of particular rules and portions thereof, including reasons therefor;

"(B) recommend changes and modifications in the organization of such rules and in the technical presentation and structure thereof; and

"(C) be designed to coordinate, to make more

understandable, and to modernize such rules in order to facilitate effective and fair administration thereof. Each such submission shall include the text of such rules, as proposed to be recodified, in their entirety; a comparative text of the proposed changes in existing rules; and explanatory and supporting statements and materials. The rules, as proposed to be recodified, shall not be at variance, in any substantive respect, with the text of the rules of the Federal Power Commission which are in effect or proposed as of the date of such submission.

"(2) Within 480 days after the date of enactment of this subsection, the Administrative Conference of the United States shall submit to the Congress and to the Federal Power Commission its comments on each initial proposal submitted under paragraph (1), together with any recommendations and other material which it considers appropriate.

"(3) Within 570 days after the date of enactment of this subsection, the Chairman of the Federal Power Commission shall develop, prepare, and submit to the Congress, in accordance with the requirements described in paragraph (1), a final proposal setting forth a recodification of all of the rules which such agency has issued and which are in effect or proposed, as of the date of such submission. Such submission shall reflect (1) evaluation of the recommenda-

tions and comments received under paragraph (2) and from any other source; and (2) the results of additional study and review by such agency and its employees and consultants. Such rules shall take effect 90 days after the date of submission of such final proposal.

"(4) Each duly authorized committee of the Congress shall, in the exercise of its oversight responsibility, examine, study, and take other appropriate action with respect to each initial and final proposal submitted to the Congress and referred to such committee.

"(5) The text of each initial proposal submitted under paragraph (1), and of each final proposal submitted under paragraph (3), shall be published in the Federal Register pursuant to section 553 of title 5, United States Code, and written comments thereon shall be invited. Any rule issued by the Federal Power Commission which is not included in the recodified rules which take effect pursuant to paragraph (3), by the time required, shall be of no force and effect after such date. The provisions of chapter 7 of title 5, United States Code, shall apply to rules repromulgated under this subsection.

"(6) As used in this subsection, the term 'rule' means the whole or a part of a statement of general or particular applicability which is issued or promulgated by the Federal Power Commission for future effect and which is designed

to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice requirements of such Commission, including, but not limited to, regulations, the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, any general statement of policy, and any determination, directive, authorization, requirement, designation, or similar such action. The term does not include any order, as such term is defined in section 551 (6) of title 5, United States Code.".

(d) Section 27 of the Consumer Product Safety Commission Act (15 U.S.C. 2076) is amended by adding at the end thereof the following new subsection:

"(m) (1) Within 360 days after the date of enactment of this subsection, the Chairman of the Consumer Product Safety Commission shall develop, prepare, and submit to the Congress and to the Administrative Conference of the United States an initial proposal setting forth a recodification of all of the rules which such Commission has issued and which are in effect or proposed, as of the date of such submission. Each such recodification proposal shall, to the extent practicable and appropriate—

"(A) recommend the transfer, consolidation, modification, and deletion of particular rules and portions thereof, including reasons therefor;

"(B) recommend changes and modifications in the organization of such rules and in the technical presentation and structure thereof; and

"(C) be designed to coordinate, to make more understandable, and to modernize such rules in order to facilitate effective and fair administration thereof.

Each such submission shall include the text of such rules, as proposed to be recodified, in their entirety; a comparative text of the proposed changes in existing rules; and explanatory and supporting statements and materials. The rules, as proposed to be recodified, shall not be at variance, in any substantive respect, with the text of the rules of the Consumer Product Safety Commission which are in effect or proposed as of the date of such submission.

"(2) Within 480 days after the date of enactment of this subsection, the Administrative Conference of the United States shall submit to the Congress and to the Consumer Product Safety Commission its comments on each initial proposal submitted under paragraph (1), together with any recommendations and other material which it considers appropriate.

"(3) Within 570 days after the date of enactment of

this subsection, the Chairman of the Consumer Product Safety Commission shall develop, prepare, and submit to the Congress, in accordance with the requirements described in paragraph (1), a final proposal setting forth a recodification of all of the rules which such agency has issued and which are in effect or proposed, as of the date of such submission. Such submission shall reflect (1) evaluation of the recommendations and comments received under paragraph (2) and from any other source; and (2) the results of additional study and review by such agency and its employees and consultants. Such rules shall take effect 90 days after the date of submission of such final proposal.

"(4) Each duly authorized committee of the Congress shall, in the exercise of its oversight responsibility, examine, study, and take other appropriate action with respect to each initial and final proposal submitted to the Congress and referred to such committee.

"(5) The text of each initial proposal submitted under paragraph (1), and of each final proposal submitted under paragraph (3), shall be published in the Federal Register pursuant to section 553 of title 5, United States Code, and written comments thereon shall be invited. Any rule issued by the Consumer Product Safety Commission which is not included in the recodified rules which take effect pursuant to paragraph (3), by the time required, shall be of no force

and effect after such date. The provisions of chapter 7 of title 5, United States Code, shall apply to rules repromulgated under this subsection.

"(6) As used in this subsection, the term "rule" means the whole or a part of a statement of general or particular applicability which is issued or promulgated by the Consumer Product Safety Commission for future effect and which is designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice requirements of such Commission, including, but not limited to, regulations, the approval or prescription for the future of rates, wages, corporate ro financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, any general statement of policy, and any determination, directive, authorization, requirement, designation, or similar such action. The term does not include any order, as such term is defined in section 551(6) of title 5, United States Code.".

SEC. 4. LAW REVISION.

(a) Section 20 of the Federal Trade Commission Act (15 U.S.C. 57c), as amended by this Act, is further amended by adding at the end thereof the following new subsection:

"(d) (1) The Federal Trade Commission shall, in co-

operation with any other interested department, agency, or instrumentality of the Federal Government—

"(A) make a full and complete review and study of the law of the United States relating to the Commission for the purpose of formulating and recommending to the Congress legislation that would better achieve the purpose for which the Commission was established; and

"(B) review, study, make recommendations for revision and codification of the statutes and other lawful authorities administered by or applicable to the Commission; the repeal, transfer, consolidation, and modification of any particular provisions and portions thereof; any changes and modifications in the organization and structure of such statutes in the technical presentation of matters included therein; and such changes in the authorities delegated, the functions prescribed, and the structure and procedures mandated or authorized as the Commission believes may coordinate, make more understandable, and modernize the laws of the United States relating to the promotion of competition and the protection of consumers in order to facilitate effective and fair administration thereof and to enhance commerce and protect consumers.

"(2) The Chairman of the Commission, if three or more Commissioners agree, may appoint and compensate a qualified individual to serve as the director of the Commission's law revision activity under this subsection. Such person shall be appointed without regard to the provision of title 5, United States Code, governing appointments in the competitive service, but at a rate not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title. The director shall serve as the Commission's reporter and shall, subject to the direction of the Commission, supervise the preparation of reports and the activities of applicable personnel. Individuals may be employed by the Commission on a full- or part-time basis for purposes of assisting in, or contributing to, law revision activity provided for under this subsection, without regard to the civil service laws. Any department, agency, or other instrumentality of the Federal Government shall, to the extent of available resources and upon a written request from the Chairman of the Commission, make available to the Commission such qualified personnel (with their consent and without prejudice to their position and rating), services, facilities and information as may be necessary or appropriate to assist in achieving the purposes of this subsection.

"(3) The Commission shall establish an Advisory Committee on Law Revision to advise and consult with the Chair-

man and other Commissioners and with its law revision staff. Except as otherwise provided in this paragraph, the members of such Advisory Committee shall be appointed by the Chairman of the Commission and shall be individuals who are especially qualified, by reason of knowledge, experience, or training, to assist in law revision activity under this subsection.

"(4) The Commission shall invite, and afford interested persons and other governmental entities an opportunity to submit, comments and recommendations with respect to some or all of the law revision activity described in subparagraphs (A) and (B) of paragraph (1). The Commission shall evaluate and consider all responses and submissions received by it with respect to such law revision activity. The Commission shall coordinate its law revision activity under this subsection with any such activity conducted by the Law Revision Counsel of the House of Representatives or the Congressional Research Service of the Library of Congress. Each department, agency, and independent instrumentality of the Federal Government shall cooperate with, assist, and make appropriate presentations, to and reviews for, the Commission.

"(5) The Chairman of the Commission shall submit to the Congress and the President—

"(A) a preliminary report with respect to law revision activity under this subsection, including a statement indicating what, if any, additional legislative or other action is necessary to implement this subsection, not later than 6 months after the date of the enactment of this subsection; and

"(B) a final report with respect to law revision activity under this subsection, not later than 2 years after the date of the enactment of this subsection. The final report shall include the text of the proposed revision and codification; an explanation of each significant provision proposed for inclusion therein; an analysis of the economic and other consequences of such revision and codification; a discussion of significant alternatives considered but not recommended; and such other information as may be useful to the Congress. If any member of the Advisory Committee established under paragraph (3) disagrees with any matter included in the final report, such member may submit a statement setting forth the reasons for such disagreement, which the Chairman of the Commission shall include in an appendix to such report. The final report shall be designed to facilitate congressional consideration of matters relating to regulatory reform and shall be consistent with the purpose of the Congress in this subsection to clarify,

simplify, and improve (both substantively and technically) the laws of the United States to the promotion of competition and the protection of consumers.".

(b) Title IV of the Communications Act of 1934 (47 U.S.C. 401–416), as amended by this Act, is further amended by adding at the end thereof the following new section:

"SEC. 418. (a) The Federal Communications Commission shall, in cooperation with any other interested department, agency, or instrumentality of the Federal Government—

"(1) make a full and complete review and study of the law of the United States relating to the Commission for the purpose of formulating and recommending to the Congress legislation that would better achieve the purposes for which the Commission was established; and

"(2) review, study, and make recommendations for revision and codification of the statutes and other lawful authorities administered by or applicable to the Commission or otherwise set forth in title 46 of the United States Code, including the review of any existing proposals relating to the codification of such title 46; the repeal, transfer, consolidation, and modification of any particular provisions and portions thereof; any changes

and modifications in the organization and structure of such statutes and in the technical presentation of matters included therein; and such changes in the authorities delegated, the functions prescribed, and the structure and procedures mandated or authorized as the Commission believes may coordinate, make more understandable, and modernize the laws of the United States relating to communications in order to facilitate effective and fair administration thereof and to enhance commerce and protect consumers.

"(b) The Chairman of the Commission, if three or more Commissioners agree, may appoint and compensate a qualified individual to serve as the director of the Commission's law revision activity under this subsection. Such person shall be appointed without regard to the provision of title 5, United States Code, governing appointments in the competitive service, but at a rate not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title. The director shall serve as the Commission's reporter and shall, subject to the direction of the Commission, supervise the preparation of reports and the activities of applicable personnel. Individuals may be employed by the Commission on a full- or part-time basis for purposes of assisting in, or contributing to, law revision activity provided for under this subsection, without regard to the civil service

laws. Any department, agency, or other instrumentality of the Federal Government shall, to the extent of available resources and upon a written request from the Chairman of the Commission, make available to the Commission such qualified personnel (with their consent and without prejudice to their position and rating), services, facilities and information as may be necessary or appropriate to assist in achieving the purposes of this subsection.

"(c) The Commission shall establish an Advisory Committee on Law Revision to advise and consult with the Chairman and other Commissioners and with its law revision staff. Except as otherwise provided in this paragraph, the members of such Advisory Committee shall be appointed by the Chairman of the Commission and shall be individuals who are especially qualified, by reason of knowledge, experience, or training, to assist in law revision activity under this subsection.

"(d) The Commission shall invite, and afford interested persons and other governmental entities an opportunity to submit, comments and recommendations with respect to some or all of the law revision activity described in subparagraphs (1) and (2) of subsection (a). The Commission shall evaluate and consider all responses and submissions received by it with respect to such law revision activity. The Commission shall coordinate its law revision activity under

this subsection with any such activity conducted by the Law Revision Counsel of the House of Representatives or the Congressional Research Service of the Library of Congress. Each department, agency, and independent instrumentality of the Federal Government shall cooperate with, assist, and make appropriate presentations to, and reviews for, the Commission.

"(e) The Chairman of the Commission shall submit to the Congress and the President—

"(1) a preliminary report with respect to law revision activity under this subsection, including a statement indicating what, if any, additional legislative or other action is necessary to implement this subsection, not later than 6 months after the date of the enactment of this section; and

"(2) a final report with respect to law revision activity under this subsection, not later than 2 years after the date of the enactment of this section. The final report shall include the text of the proposed revision and codification; an explanation of each significant provision proposed for inclusion therein; an analysis of the economic and other consequences of such revision and codification; a discussion of significant alternatives considered but not recommended; and such other information as may be useful to the Congress. If any member

of the Advisory Committee established under subsection (c) disagrees with any matter included in the final report, such member may submit a statement setting forth the reasons for such disagreement, which the Chairman of the Commission shall include in an appendix to such report. The final report shall be designed to facilitate congressional consideration of matters relating to regulatory reform and shall be consistent with the purpose of the Congress in this subsection to clarify, simplify, and improve (both substantively and technically) the laws of the United States to communications.".

(c) Section 29 of the Federal Power Act (16 U.S.C. 823), as amended by this Act, is further amended by adding at the end thereof the following new subsection:

"(c) (1) The Federal Power Commission shall, in cooperation with any other interested department, agency, or instrumentality of the Federal Government—

"(A) make a full and complete review and study of the law of the United States relating to the Commission for the purpose of formulating and recommending to the Congress legislation that would better achieve the purposes for which the Commission was established; and

"(B) review, study, and make recommendations for revision and codification of the statutes and other

lawful authorities administered by or applicable to the Commission; the repeal, transfer, consolidation, and modification of any particular provisions and portions thereof; any changes and modifications in the organization and structure of such statutes and in the technical presentation of matters included therein; and such changes in the authorities delegated, the functions prescribed, and the structure and procedures mandated or authorized as the Commission believes may coordinate, make more understandable, and modernize the laws of the United States relating to energy regulation in order to facilitate effective and fair administration thereof and to enhance commerce and protect consumers.

"(2) The Chairman of the Commission, if three or more Commissioners agree, may appoint and compensate a qualified individual to serve as the director of the Commission's law revision activity under this subsection. Such person shall be appointed without regard to the provision of title 5, United States Code, governing appointments in the competitive service, but at a rate not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title. The director shall serve as the Commission's reporter and shall, subject to the direction of the Commission, supervise the preparation of reports and the activities of applicable personnel. Individuals may be employed by the

Commission on a full- or part-time basis for purposes of assisting in, or contributing to, law revision activity provided for under this subsection, without regard to the civil service laws. Any department, agency, or other instrumentality of the Federal Government shall, to the extent of available resources and upon a written request from the Chairman of the Commission, make available to the Commission such qualified personnel (with their consent and without prejudice to their position and rating), services, facilities, and information as may be necessary or appropriate to assist in achieving the purposes of this subsection.

"(3) The Commission shall establish an Advisory Committee on Law Revision to advise and consult with the Chairman and other Commissioners and with its law revision staff. Except as otherwise provided in this paragraph, the members of such Advisory Committee shall be appointed by the Chairman of the Commission and shall be individuals who are especially qualified, by reason of knowledge, experience, or training, to assist in law revision activity under this subsection.

"(4) The Commission shall invite, and afford interested persons and other governmental entities an opportunity to submit, comments and recommendations with respect to some or all of the law revision activity described in subparagraphs (A) and (B) of paragraph (1). The Commission

shall evalate and consider all responses and submissions received by it with respect to such law revision activity. The Commission shall coordinate its law revision activity under this subsection with any such activity conducted by the Law Revision Counsel of the House of Representatives or the Congressional Research Service of the Library of Congress. Each department, agency, and independent instrumentality of the Federal Goverment shall cooperate with, assist, and make appropriate presentations, to and reviews for, the Commission.

"(5) The Chairman of the Commission shall submit to the Congress and the President—

"(A) a preliminary report with respect to law revision activity under this subsection, including a statement indicating what, if any, additional legislative or other action is necessary to implement this subsection, not later than 6 months after the date of the enactment of this subsection; and

"(B) a final report with respect to law revision activity under this subsection, not later than 2 years after the date of the enactment of this subsection. The final report shall include the text of the proposed revision and codification; an explanation of each significant provision proposed for inclusion therein; an analysis of the economic and other consequences of such revision and

codification; a discussion of significant alternatives considered but not recommended; and such other information as may be useful to the Congress. If any member of the Advisory Committee established under paragraph (3) disagrees with any matter included in the final report, such member may submit a statement setting forth the reasons for such disagreement, which the Chairman of the Commission shall include in an appendix to such report. The final report shall be designed to facilitate congressional consideration of matters relating to regulatory reform and shall be consistent with the purpose of the Congress in this subsection to clarify, simplify, and improve (both substantively and technically) the laws of the United States to energy regulation.".

(d) Section 27 of the Consumer Product Safety Act (15 U.S.C. 2076), as amended by this Act, is further amended by adding at the end thereof the following new subsection:

"(n) (1) The Consumer Product Safety Commission shall, in cooperation with any other interested department, agency, or instrumentality of the Federal Government—

"(A) make a full and complete review and study of the law of the United States relating to the Commission for the purpose of formulating and recommend-

ing to the Congress legislation that would better achieve the purposes for which the Commission was established; and

."(B) review, study, and make recommendations for revision and codification of the statutes and other lawful authorities administered by or applicable to the Commission; the repeal, transfer, consolidation, and modification of any particular provisions and portions thereof; any changes and modifications in the organization and structure of such statutes and in the technical presentation of matters included therein; and such changes in the authorities delegated, the functions prescribed, and the structure and procedures mandated or authorized as the Commission believes may coordinate, make more understandable, and modernize the laws of the United States relating to product safety in order to facilitate effective and fair administration thereof and to enhance commerce and protect consumers.

"(2) The Chairman of the Commission, if three or more Commissioners agree, may appoint and compensate a qualified individual to serve as the director of the Commission's law revision activity under this subsection. Such person shall be appointed without regard to the provision of title 5, United States Code, governing appointments in the competitive service, but at a rate not in excess of the maximum rate

for GS–18 of the General Schedule under section 5332 of such title. The director shall serve as the Commission's reporter and shall, subject to the direction of the Commission, supervise the preparation of reports and the activities of applicable personnel. Individuals may be employed by the Commission on a full- or part-time basis for purposes of assisting in, or contributing to, law revision activity provided for under this subsection, without regard to the civil service laws. Any department, agency, or other instrumentality of the Federal Government shall, to the extent of available resources and upon a written request from the Chairman of the Commission, make available to the Commission such qualified personnel (with their consent and without prejudice to their position and rating), services, facilities and information as may be necessary or appropriate to assist in achieving the purposes of this subsection.

"(3) The Commission shall establish an Advisory Committee on Law Revision to advise and consult with the Chairman and other Commissioners and with its law revision staff. Except as otherwise provided in this paragraph, the members of such Advisory Committee shall be appointed by the Chairman of the Commission and shall be individuals who are especially qualified, by reason of knowledge, experience, or training, to assist in law revision activity under this subsection.".

"(4) The Commission shall invite, and afford interested persons and other governmental entities an opportunity to submit, comments and recommendations with respect to some or all of the law revision activity described in subparagraphs (A) and (B) of paragraph (1). The Commission shall evaluate and consider all responses and submissions received by it with respect to such law revision activity. The Commission shall coordinate its law revision activity under this subsection with any such activity conducted by the Law Revision Counsel of the House of Representatives or the Congressional Research Service of the Library of Congress. Each department, agency, and independent instrumentality of the Federal Government shall cooperate with, assist, and make appropriate presentations, to and reviews for, the Commission.

"(5) The Chairman of the Commission shall submit to the Congress and the President—

"(A) a preliminary report with respect to law revision activity under this subsection, including a statement indicating what, if any, additional legislative or other action is necessary to implement this subsection, not later than 6 months after the date of the enactment of this subsection; and

"(B) a final report with respect to law revision activity under this subsection, not later than 2 years after

the date of the enactment of this subsection. The final report shall include the text of the proposed revision and codification; and explanation of each significant provision proposed for inclusion therein; an analysis of the economic and other consequences of such revision and codification; a discussion of significant alternatives considered but not recommended; and such other information as may be useful to the Congress. If any member of the Advisory Committee established under paragraph (3) disagrees with any matter included in the final report, such member may submit a statement setting forth the reasons for such disagreement, which the Chairman of the Commission shall include in an appendix to such report. The final report shall be designed to facilitate congressional consideration of matters relating to regulatory reform and shall be consistent with the purpose of the Congress in this subsection to clarify, simplify, and improve (both substantively and technically) the laws of the United States to product safety.".

SEC. 5. TIMELY CONSIDERATION OF PETITIONS.

(a) (1) Section 18(b) of the Federal Trade Commission Act (15 U.S.C. 570(b)) is amended (1) by inserting "(1)" immediately after "(b)" and (2) by inserting at the end thereof the following new paragraph:

"(2) (A) Whenever, pursuant to section 553 (e) of title 5, United States Code, an interested person (including a governmental entity) petitions the Commission for the commencement of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under any statute or other lawful authority administered by or applicable to the Commission, the Commission shall grant or deny such petition within 120 days after the date of receipt of such petition. If the Commission grants such a petition, it shall commence an appropriate proceeding as soon thereafter as practicable. If the Commission denies such a petition, it shall set forth, and publish in the Federal Register, its reasons for such denial.

"(B) If the Commission denies a petition under subparagraph (A) (or if it fails to act thereon within the 120-day period established by such subparagraph), the petitioner may commence a civil action in an appropriate district court of the United States for an order directing the Commission to initiate a proceeding to take the action requested in such petition. Such an action shall be commenced within 60 days after the date of such denial or, where appropriate, within 60 days after the date of expiration of such 120-day period.

"(C) If the petitioner, in a civil action commenced under subparagraph (B), demonstrates to the satisfaction of

the court (by a preponderance of the evidence in the record before the Commission or, in an action based on a petition on which the Commission failed to act, in a new proceeding before such court) (i) that the failure of the Commission to grant a petition submitted under subparagraph (A) is arbitrary and capricious; (ii) that the action requested in such petition is necessary; and (iii) that the failure of the Commission to take such action will result in the continuation of practices which are not consistent with or in accordance with this Act or any other statute or lawful authority administered by or applicable to the Commission, such court shall order the Commission to initiate such action.

"(D) A court shall have no authority under this paragraph to compel the Commission to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under this Act or any other statute or lawful authority administered by or applicable to the Commission.

"(E) As used in this paragraph, the term 'Commission' includes any division, individual Commissioner, administrative law judge, employee board, or any other person authorized to act on behalf of the Commission in any part of any proceeding for the issuance, amendment, or repeal of an order, rule, or regulation.".

(b) Section 406 of the Communications Act of 1934 (47

U.S.C. 406) is amended (1) by inserting "(a)" immediately before the first sentence thereof; and (2) by adding at the end thereof the following new subsection:

"(b) (1) Whenever, pursuant to section 553 (e) of title 5, United States Code, an interested person (including a governmental entity) petitions the Commission for the commencement of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under any statute or other lawful authority administered by or applicable to the Commission, the Commission shall grant or deny such petition within 120 days after the date of receipt of such petition. If the Commission grants such a petition, it shall commence an appropriate proceeding as soon thereafter as practicable. If the Commission denies such a petition, it shall set forth, and publish in the Federal Register, its reasons for such denial.

"(2) If the Commission denies a petition under paragraph (1) (or if it fails to act thereon within the 120-day period established by such paragraph), the petitioner may commence a civil action in an appropriate district court of the United States for an order directing the Commission to initiate a proceeding to take the action requested in such petition. Such an action shall be commenced within 60 days after the date of such denial or, where appropriate, within 62 days after the date of expiration of such 120-day period.

"(3) If the petitioner, in a civil action commenced under paragraph (2), demonstrates to the satisfaction of the court (by a preponderance of the evidence in the record before the Commission or, in an action based on a petition on which the Commission failed to act, in a new proceeding before such court) (A) that the failure of the Commission to grant a petition submitted under paragraph (1) is arbitrary and capricious; (B) that the action requested in such petition is necessary; and (C) that the failure of the Commission to take such action will result in the continuation of practices which are not consistent with or in accordance with this Act or any other statute or lawful authority administered by or applicable to the Commission, such court shall order the Commission to initiate such action.

"(4) A court shall have no authority under this subsection to compel the Commission to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under this Act or any other statute or lawful authority administered by or applicable to the Commission.

"(5) As used in this subsection, the term 'Commission' includes any division, individual Commissioner, administrative law judge, employee board, or any other person authorized to act on behalf of the Commission in any part

of any proceeding for the issuance, amendment, or repeal of an order, rule, or regulation.".

(c) Section 309 of the Federal Power Act (16 U.S.C. 825h) is amended (1) by inserting "(a)" immediately before the first sentence thereof; and (2) by adding at the end thereof the following new subsection:

"(b) (1) Whenever, pursuant to section 553(e) of title 5, United States Code, an interested person (including a governmental entity) petitions the Commission for the commencement of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under any statute or other lawful authority administered by or applicable to the Commission, the Commission shall grant or deny such petition within 120 days after the date of receipt of such petition. If the Commission grants such a petition, it shall commence an appropriate proceeding as soon thereafter as practicable. If the Commission denies such a petition, it shall set forth, and publish in the Federal Register, its reasons for such denial.

"(2) If the Commission denies a petition under paragraph (1) (or if it fails to act thereon within the 120-day period established by such paragraph), the petitioner may commence a civil action in an appropriate district court of the United States for an order directing the Commission to initiate a proceeding to take the action requested in such

petition. Such an action shall be commenced within 60 days after the date of such denial or, where appropriate, within 60 days after the date of expiration of such 120-day period.

"(3) If the petitioner, in a civil action commenced under paragraph (2), demonstrates to the satisfaction of the court (by a preponderance of the evidence in the record before the Commission or, in an action based on a petition on which the Commission failed to act, in a new proceeding before such court) (A) that the failure of the Commission to grant a petition submitted under paragraph (1) is arbitrary and capricious; (B) that the action requested in such petition is necessary; and (C) that the failure of the Commission to take such action will result in the continuation of practices which are not consistent with or in accordance with this Act or any other statute or lawful authority administered by or applicable to the Commission, such court shall order the Commission to initiate such action.

"(4) A court shall have no authority under this subsection to compel the Commission to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under this Act or any other statute or lawful authority administered by or applicable to the Commission.

"(5) As used in this subsection, the term 'Commission' includes any division, individual Commissioner, administra-

tive law judge, employee board, or any other person authorized to act on behalf of the Commission in any part of any proceeding for the issuance, amendment, or repeal of an order, rule, or regulation.".

SEC. 6. CONGRESSIONAL ACCESS TO INFORMATION.

(a) Section 1 of the Federal Trade Commission Act (15 U.S.C. 41) is amended (1) by striking out "That a" in the first sentence thereof and inserting in lieu thereof "(a) A"; and (2) by adding at the end thereof the following new subsection:

"(b) (1) Whenever the Commission submits any budget estimate, request, or information to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such budget estimate, request, or information to the Congress.

"(2) Whenever the Commission submits any legislative recommendations, testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

"(3) Whenever a duly authorized committee of the Congress which has responsibility for the authorization of appropriations for the Commission makes a written request for documents in the possession or subject to the control of the Commission, the Commission shall, within 10 days after the date of receipt of such request, submit such documents (or copies thereof) to such committee. If the Commission does not have any such documents in its possession it shall so notify such committee within such 10-day period. Any such notice shall state the anticipated date by which such documents will be obtained and submitted to such committee. Whenever the Commission transfers any document in its possession or subject to its control to any person or any other governmental entity, it shall condition such transfer on the guaranteed return by the transferee of such document to the Commission so that the Commission can comply with the requirement of this paragraph. This paragraph shall not be deemed to restrict any other authority of either House of Congress, or any committee or subcommittee thereof, to obtain documents. For purposes of this paragraph, the term 'document' means any book, paper, correspondence, memorandum, or other record, including a copy of any of the foregoing.".

(b) Section 4 of the Communications Act of 1934

(47 U.S.C. 154) is amended by inserting at the end thereof the following new subsection:

"(p) (1) Whenever the Commission submits any budget estimate, request, or information to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such budget estimate, request, or information to the Congress.

"(2) Whenever the Commission submits any legislative recommendations, testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

"(3) Whenever a duly authorized committee of the Congress which has responsibility for the authorization of appropriations for the Commission makes a written request for documents in the possession or subject to the control of the Commission, the Commission shall, within 10 days after the date of receipt of such request, submit such documents (or copies thereof) to such committee. If the Commission does not have any such documents in its possession, it

shall so notify such committee within such 10-day period. Any such notice shall state the anticipated date by which such documents will be obtained and submitted to such committee. Whenever the Commission transfers any document in its possession or subject to its control to any person or any other governmental entity, it shall condition such transfer on the guaranteed return by the transferee of such document to the Commission so that the Commission can comply with the requirement of this paragraph. This paragraph shall not be deemed to restrict any other authority of either House of Congress, or any committee or subcommittee thereof, to obtain documents. For purposes of this paragraph, the term 'document' means any book, paper, correspondence, memorandum, or other record, including a copy of any of the foregoing.".

(c) Section 1 of the Federal Power Act (16 U.S.C. 792) is amended (1) by designating the four paragraphs thereof as subsections (a), (b), (c), and (d), respectively; (2) by striking out "That a" in subsection (a) as so designated and inserting in lieu thereof "A"; and (3) by adding at the end thereof the following new subsection:

"(e) (1) Whenever the Commission submits any budget estimate, request, or information to the President or the Office of Management and Budget, it shall concurrently transmit a

copy of such budget estimate, request, or information to the Congress.

"(2) Whenever the Commission submits any legislative recommendations, testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

"(3) Whenever a duly authorized committee of the Congress which has responsibility for the authorization of appropriations for the Commission makes a written request for documents in the possession or subject to the control of the Commission, the Commission shall, within 10 days after the date of receipt of such request, submit such documents (or copies thereof) to such committee. If the Commission does not have any such documents in its possession, it shall so notify such committee within such 10-day period. Any such notice shall state the anticipated date by which such documents will be obtained and submitted to such committee. Whenever the Commission transfers any document in its possession or subject to its control to any person or any other

governmental entity, it shall condition such transfer on the guaranteed return by the transferee of such document to the Commission so that the Commission can comply with the requirement of this paragraph. This paragraph shall not be deemed to restrict any other authority of either House of Congress, or any committee or subcommittee thereof, to obtain documents. For purposes of this paragraph, the term 'document' means any book, paper, correspondence, memorandum, or other record, including a copy of any of the foregoing.".

(d) Section 27(k) of the Consumer Product Safety Act (15 U.S.C. 2076(k)) is amended by adding at the end thereof the following new paragraph:

"(3) Whenever a duly authorized committee of the Congress which has responsibility for the authorization of appropriations for the Commission makes a written request for documents in the possession or subject to the control of the Commission, the Commission shall, within 10 days after the date of receipt of such request, submit such documents (or copies thereof) to such committee. If the Commission does not have any such documents in its possession, it shall so notify such committee within such 10-day period. Any such notice shall state the anticipated date by which such documents will be obtained and submitted to such committee. Whenever the Commission transfers any document in its pos-

session or subject to its control to any person or any other governmental entity, it shall condition such transfer on the guaranteed return by the transferee of such document to the Commission so that the Commission can comply with the requirement of this paragraph. This paragraph shall not be deemed to restrict any other authority of either House of Congress, or any committee or subcommittee thereof, to obtain documents. For purposes of this paragraph, the term 'document' means any book, paper, correspondence, memorandum, or other record, including a copy of any of the foregoing.".

SEC. 7. REPRESENTATION IN CIVIL ACTIONS.

(a) Section 401 of the Communications Act of 1934 (47 U.S.C. 401) is amended by adding at the end thereof the following new subsection:

"(e) (1) If—

"(A) before commencing, defending, or intervening in, any civil action involving any statute administered by the Commission (including an action for a forfeiture), which the Commission or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

"(B) the Attorney General fails, within 45 days

after receipt of such notification, to commence, defend, or intervene in, such action;

the Commission shall have authority to commence, defend, or intervene in, and to supervise the litigation of, such action (and any appeal of such action) in its own name by any of its attorneys designated by it for such purpose.

"(2) Notwithstanding paragraph (1), the Commission shall have authority (in its own name, by any of its own attorneys designated by it for such purpose) to seek temporary or preliminary injunctive relief in, or to initiate the defense of, any action in which the Commission has given written notification to the Attorney General under paragraph (1) (A). Such authority shall continue so long as the Attorney General fails, within the time specified in paragraph (1) (B), to assume the prosecution or defense of such action.

"(3) The Commission shall exercise the authority granted by this subsection for the purpose of promoting, and in a manner which will promote, the effective enforcement of any statute administered by the Commission. The Department of Justice shall, to the extent practicable, provide the Commission with such assistance as will promote the successful and economical resolution of any civil action with respect to which the Commission exercises the authority granted by this subsection, and the Commission shall cooperate with such department in all other actions.

"(4) The provisions of this subsection shall not apply to any civil action commenced before the date of enactment of this subsection.".

(b) Section 314 of the Federal Power Act (16 U.S.C. 825m) is amended by adding at the end thereof the following new subsection:

"(d) (1) If—

"(A) before commencing, defending, or intervening in, any civil action involving any statute administered by the Commission (including an action for a forfeiture), which the Commission or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

"(B) the Attorney General fails, within 45 days after receipt of such notification, to commence, defend, or intervene in, such action;

the Commission shall have authority to commence, defend, or intervene in, and to supervise the litigation of, such action (and any appeal of such action) in its own name by any of its attorneys designated by it for such purpose.

"(2) Notwithstanding paragraph (1), the Commission shall have authority (in its own name, by any of its own attorneys designated by it for such purpose) to seek tempo-

rary or preliminary injunctive relief in, or to initiate the defense of, any action in which the Commission has given written notification to the Attorney General under paragraph (1) (A). Such authority shall continue so long as the Attorney General fails, within the time specified in paragraph (1) (B), to assume the prosecution or defense of such action.

"(3) The Commission shall exercise the authority granted by this subsection for the purpose of promoting, and in a manner which will promote, the effective enforcement of any statute administered by the Commission. The Department of Justice shall, to the extent practicable, provide the Commission with such assistance as will promote the successful and economical resolution of any civil action with respect to which the Commission exercises the authority granted by this subsection, and the Commission shall cooperate with such department in all other actions.

"(4) The provisions of this subsection shall not apply to any civil action commenced before the date of enactment of this subsection.".

SEC. 8. PROTECTION OF OFFICERS.

Section 1114 of title 18, United States Code, is amended by inserting immediately after "Consumer Product Safety Commission," the following: "the Interstate Commerce Commission, the Federal Trade Commission, the Federal Power Commission, the Federal Communications Commission, the

Civil Aeronautics Board, the Federal Maritime Commission,".

SEC. 9. AVOIDANCE OF CONFLICT OF INTEREST.

(a) Section 1 (a) of the Federal Trade Commission Act (15 U.S.C. 41 (a)), as amended by this Act, is further amended by striking out "No Commissioner shall engage in any other business, vocation, or employment." and inserting in lieu thereof "No Commissioner shall engage in any other business, vocation, profession, or employment while serving as a Commissioner, and no person who is appointed to a term as a Commissioner after the date of enactment of this sentence shall, for a period of 2 years following the termination of service as a Commissioner, represent any person before the Commission in a professional capacity.".

(b) Section 4 (b) of the Communications Act of 1934 (47 U.S.C. 154 (b)) is amended by striking out "Such commissioners shall not" and all that follows through "term for which he was appointed." and inserting in lieu thereof the following: "No Commissioner shall engage in any other business, vocation, profession, or employment while serving as a commissioner, and no person who is appointed to a term as a Commissioner after the date of enactment of this sentence shall, for a period of 2 years following the termination of service as a commissioner, represent any person before the Commission in a professional capacity.".

(c) Section 1 (b) of the Federal Power Act (16 U.S.C. 792 (b)) as amended by this Act, is further amended by striking out "Said commissioners shall not engage in any other business, vocation, or employment." and inserting in lieu thereof the following: "No Commissioner shall engage in any other business, vocation, profession, or employment while serving as a Commissioner, and no person who is appointed to a term as a Commissioner after the date of enactment of this sentence shall, for a period of 2 years following the termination of service as a Commissioner, represent any person before the Commission in a professional capacity.".

(d) Section 4 (c) of the Consumer Product Safety Act (15 U.S.C. 2053 (c)) is amended by striking out the last sentence thereof and inserting in lieu thereof the following: "No Commissioner shall engage in any other business, vocation, profession, or employment while serving as a Commissioner, and no person who is appointed to a term as a Commissioner after the date of enactment of this sentence shall, for a period of 2 years following the termination of service as a Commissioner, represent any person before the Commission in a professional capacity.".

SEC. 10. ACCOUNTABILITY.

(a) (1) Section 1 of the Federal Trade Commission Act (15 U.S.C. 41), as amended by this Act, is further

amended by adding at the end thereof the following new subsection:

"(c) Subsections (a) and (h) of section 2680 of title 28, United States Code, do not prohibit the bringing of a civil action on a claim against the United States which—

"(1) is based upon—

"(A) misrepresentation or deceit before January 1, 1979, on the part of the Commission or any employee thereof, or

"(B) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof before January 1, 1979, which exercise, performance, or failure was grossly negligent; and

"(2) is not made with respect to any agency action (as defined in section 551(13) of title 5, United States Code).

In the case of a civil action on a claim based upon the exercise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise,

performance, or failure to exercise or perform was unreasonable.".

(2) Section 20 of the Federal Trade Commission Act (15 U.S.C. 57c), as amended by this Act, is further amended by inserting immediately before subsection (c) the following new subsection:

"(b) No funds appropriated under subsection (a) may be used to pay any claim described in section 1(c) whether pursuant to a judgment of a court or under any award, compromise, or settlement of such claim made under section 2672 of title 28, United States Code, or under any other provision of law.".

(b) Section 4 of the Communications Act of 1934 (47 U.S.C. 154), as amended by this Act, is further amended by inserting at the end thereof the following new subsection:

"(q) Subsections (a) and (h) of section 2680 of title 28, United States Code, do not prohibit the bringing of a civil action on a claim against the United States which—

"(1) is based upon—

"(A) misrepresentation or deceit before January 1, 1979, on the part of the Commission or any employee thereof, or

"(B) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof be-

fore January 1, 1979, which exercise, performance, or failure was grossly negligent; and

"(2) is not made with respect to any agency action (as defined in section 551(13) of title 5, United States Code).

In the case of a civil action on a claim based upon the exercise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable. No funds appropriated for salaries and expenses of the Commission may be used to pay any claim described in this subsection, whether pursuant to a judgment of a court or under any award, compromise, or settlement of such claim made under section 2672 of title 28, United States Code, or under any other provision of law.".

(c) Section 1 of the Federal Power Act (16 U.S.C. 792), as amended by this Act, is further amended by adding at the end thereof the following new subsection:

"(f) Subsections (a) and (h) of section 2680 of title

28, United States Code, do not prohibit the bringing of a civil action on a claim against the United States which—

"(1) is based upon—

"(A) misrepresentation or deceit before January 1, 1979, on the part of the Commission or any employee thereof, or

"(B) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof before January 1, 1979, which exercise, performance, or failure was grossly negligent; and

"(2) is not made with respect to any agency action (as defined in section 551 (13) of title 5, United States Code).

In the case of a civil action on a claim based upon the exercise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable. No funds appropriated for expenditures of the

Commission may be used to pay any claim described in this subsection, whether pursuant to a judgment of a court or under any award, compromise, or settlement of such claim made under section 2672 of title 28, United States Code, or under any other provision of law.".

SEC. 11. APPOINTMENT AND TENURE OF CHAIRMAN.

(a) Section 1(a) of the Federal Trade Commission Act (15 U.S.C. 41), as amended by this Act, is further amended by striking out "The President shall choose" and all that follows through "membership." and inserting in lieu thereof the following: "The President shall appoint one of the Commissioners to serve as the Chairman of the Commission, by and with the advice and consent of the Senate, for a term of 3 years: *Provided, however,* That upon the expiration of a term as Chairman, such Commissioner shall continue to serve as the Chairman of the Commission until reappointed or until his successor shall have been appointed and shall have qualified. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman.".

(b) Section 4(a) of the Communications Act of 1934 (47 U.S.C. 154(a)), is amended by deleting all after the word "consent" through "chairman." and inserting in lieu thereof the following: "of the Senate. The President shall appoint one of the Commissioners to serve as the Chair-

man of the Commission, by and with the advice and consent of the Senate, for a term of 3 years: *Provided, however,* That upon the expiration of a term as Chairman, such Commissioner shall continue to serve as the Chairman of the Commission until reappointed or until his successor shall have been appointed and shall have qualified. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman.".

(c) Section 1 (a) of the Federal Power Act (16 U.S.C. 792), as so designated by this Act, is amended by deleting all after "consent" through "office" and inserting in lieu thereof the following: "of the Senate. The President shall appoint one of the Commissioners to serve as the Chairman of the Commission, by and with the advice and consent of the Senate, for a term of 3 years: *Provided, however,* That upon the expiration of a term as Chairman, such Commissioner shall continue to serve as the Chairman of the Commission until reappointed or until his successor shall have been appointed and shall have qualified. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman.".

(d) Section 4 (a) of the Consumer Product Safety Act (15 U.S.C. 2053 (a)), is amended by deleting all after "consent" through "Commissioner." and inserting in lieu thereof the following: "of the Senate. The President shall

appoint one of the Commissioners to serve as the Chairman of the Commission, by and with the advice and consent of the Senate, for a term of 3 years: *Provided, however,* That upon the expiration of a term as Chairman, such Commissioner shall continue to serve as the Chairman of the Commission until reappointed or until his successor shall have been appointed and shall have qualified. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman.".

SEC. 12. AUTHORIZATION OF APPROPRIATIONS.

(a) Section 4 of the Communications Act of 1934 (47 U.S.C. 154), as amended by this Act, is further amended by adding at the end thereof the following new subsection:

"(c) Amounts appropriated to carry out the functions, powers, and duties of the Commission shall not exceed $57,717,000 for the fiscal year ending September 30, 1978, $60,465,000 for the fiscal year ending September 30, 1979, and $63,213,000 for the fiscal year ending September 30, 1980.".

(b) Section 2 of the Federal Power Act (16 U.S.C. 795) is amended (1) by inserting "(a)" immediately before the first sentence thereof; and (2) by adding at the end thereof the following new subsection:

"(6) Amounts appropriated to carry out the functions, powers, and duties of the Commission shall not exceed

$43,630,000 for the fiscal year ending September 30, 1978, and $45,680,000 for the fiscal year ending September 30, 1979.".

SEC. 13. CIVIL AERONAUTICS BOARD.

(a) Section 204 of the Federal Aviation Act of 1958 (49 U.S.C. 1324) is amended by adding at the end thereof the following new subsection:

"(e) (1) Within 360 days after the date of enactment of this subsection, the Chairman of the Civil Aeronautics Board shall develop, prepare, and submit to the Congress and to the Administrative Conference of the United States an initial proposal setting forth a recodification of all of the rules which such Board has issued and which are in effect or proposed, as of the date of such submission. Each such recodification proposal shall, to the extent practicable and appropriate—

"(A) recommend the transfer, consolidation, modification, and deletion of particular rules and portions thereof, including reasons therefor;

"(B) recommend changes and modifications in the organization of such rules and in the technical presentation and structure thereof; and

"(C) be designed to coordinate, to make more understandable, and to modernize such rules in order to facilitate effective and fair administration thereof.

to, regulations, the approval or prescription for the future of rates, wages, corporate or financial structure or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, any general statement of policy, and any determination, directive, authorization, requirement, designation, or similar such action. The term does not include any order, as such term is defined in section 551 (6) of title 5, United States Code.".

(b) Section 204 of the Federal Aviation Act of 1958 (49 U.S.C. 1324), as amended by this Act, is further amended by adding at the end thereof the following new subsection:

"(f) (1) The Civil Aeronautics Board shall, in cooperation with any other interested department, agency, or instrumentality of the Federal Government—

"(A) make a full and complete review and study of the law of the United States relating to the Board for the purpose of formulating and recommending to the Congress legislation that would better achieve the purposes for which the Board was established; and

"(B) review, study, and make recommendations for revision and codification of the statutes and other lawful authorities administered by or applicable to the Board; the repeal, transfer, consolidation, and modification of any particular provisions and portions thereof; any

Such rules shall take effect 90 days after the date of submission of such final proposal.

"(4) Each duly authorized committee of the Congress shall, in the exercise of its oversight responsibility, examine, study, and take other appropriate action with respect to each initial and final proposal submitted to the Congress and referred to such committee.

"(5) The text of each initial proposal submitted under paragraph (1), and of each final proposal submitted under paragraph (3), shall be published in the Federal Register pursuant to section 553 of title 5, United States Code, and written comments thereon shall be invited. Any rule issued by the Civil Aeronautics Board which is not included in the recodified rules which take effect pursuant to paragraph (3), by the time required, shall be of no force and effect after such date. The provisions of chapter 7 of title 5, United States Code, shall apply to rules repromulgated under this subsection.

"(6) As used in this subsection, the term "rule" means the whole or a part of a statement of general or particular applicability which is issued or promulgated by the Civil Aeronautics Board for future effect and which is designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice requirements of such Board, including, but not limited

to, regulations, the approval or prescription for the future of rates, wages, corporate or financial structure or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, any general statement of policy, and any determination, directive, authorization, requirement, designation, or similar such action. The term does not include any order, as such term is defined in section 551 (6) of title 5, United States Code.".

(b) Section 204 of the Federal Aviation Act of 1958 (49 U.S.C. 1324), as amended by this Act, is further amended by adding at the end thereof the following new subsection:

"(f) (1) The Civil Aeronautics Board shall, in cooperation with any other interested department, agency, or instrumentality of the Federal Government—

"(A) make a full and complete review and study of the law of the United States relating to the Board for the purpose of formulating and recommending to the Congress legislation that would better achieve the purposes for which the Board was established; and

"(B) review, study, and make recommendations for revision and codification of the statutes and other lawful authorities administered by or applicable to the Board; the repeal, transfer, consolidation, and modification of any particular provisions and portions thereof; any

changes and modifications in the organization and structure of such statutes and in the technical presentation of matters included therein; and such changes in the authorities delegated, the functions prescribed, and the structure and procedures mandated or authorized as the Board believes may coordinate, make more understandable, and modernize the laws of the United States relating to aviation in order to facilitate effective and fair administration thereof and to enhance commerce and protect consumers.

"(2) The Chairman of the Board, if three or more members agree, may appoint and compensate a qualified individual to serve as the director of the Board's law revision activity under this subsection. Such person shall be appointed without regard to the provision of title 5, United States Code, governing appointments in the competitive service, but at a rate not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title. The director shall serve as the Board's reporter and shall, subject to the direction of the Board, supervise the preparation of reports and the activities of applicable personnel. Individuals may be employed by the Board on a full- or part-time basis for purposes of assisting in, or contributing to, law revision activity provided for under this subsection, without regard to the civil service laws. Any

department, agency, or other instrumentality of the Federal Government shall, to the extent of available resources and upon a written request from the Chairman of the Board, make available to the Board such qualified personnel (with their consent and without prejudice to their position and rating), services, facilities, and information as may be necessary or appropriate to assist in achieving the purposes of this subsection.

"(3) The Board shall establish an Advisory Committee on Law Revision to advise and consult with the Chairman and other members and with its law revision staff. Except as otherwise provided in this paragraph, the members of such Advisory Committee shall be appointed by the Chairman of the Board and shall be individuals who are especially qualified, by reason of knowledge, experience, or training, to assist in law revision activity under this subsection.

"(4) The Board shall invite, and afford interested persons and other governmental entities an opportunity to submit, comments and recommendations with respect to some or all of the law revision activity described in subparagraphs (A) and (B) of paragraph (1). The Board shall evaluate and consider all responses and submissions received by it with respect to such law revision activity. The Board shall coordinate its law revision activity under this subsection with any such activity conducted by the Law Revision Coun-

sel of the House of Representatives or the Congressional Research Service of the Library of Congress. Each department, agency, and independent instrumentality of the Federal Government shall cooperate with, assist, and make appropriate presentations, to and reviews for, the Board.

"(5) The Chairman of the Board shall submit to the Congress and the President—

"(A) a preliminary report with respect to law revision activity under this subsection, including a statement indicating what, if any, additional legislative or other action is necessary to implement this subsection, not later than 6 months after the date of the enactment of this subsection; and

"(B) a final report with respect to law revision activity under this subsection, not later than 2 years after the date of the enactment of this subsection. The final report shall include the text of the proposed revision and codification; an explanation of each significant provision proposed for inclusion therein; and analysis of the economic and other consequences of such revision and codification; a discussion of significant alternatives considered but not recommended; and such other information as may be useful to the Congress. If any member of the Advisory Committee established under paragraph (3) disagrees with any matter included in the final

report, such member may submit a statement setting forth the reasons for such disagreement, which the Chairman of the Board shall include in an appendix to such report. The final report shall be designed to facilitate congressional consideration of matters relating to regulatory reform and shall be consistent with the purpose of the Congress in this subsection to clarify, simplify, and improve (both substantively and technically) the laws of the United States to aviation.".

(c) Title II of the Federal Aviation Act of 1958 is amended by adding immediately after section 205 thereof (49 U.S.C. 1325) the following new section:

"MISCELLANEOUS PROVISIONS

"SEC. 206. (a) PETITIONS.—(1) Whenever, pursuant to section 553(e) of title 5, United States Code, an interested person (including a governmental entity) petitions the Board for the commencement of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under this Act, the Board shall grant or deny such petition within 120 days after the date of receipt of such petition. If the Board grants such a petition, it shall commence an appropriate proceeding as soon thereafter as practicable. If the Board denies such a petition, it shall set forth, and publish in the Federal Register, its reasons for such denial.

"(2) If the Board denies a petition under paragraph (1) (or it fails to act thereon within the 120-day period established by such paragraph), the petitioner may commence a civil action in an appropriate district court of the United States for an order directing the Board to initiate a proceeding to take the action requested in such petition. Such an action shall be commenced within 60 days after the date of such denial or, where appropriate, within 60 days after the date of expiration of such 120-day period.

"(3) If the petitioner, in a civil action commenced under paragraph (2), demonstrates to the satisfaction of the court (by a preponderance of the evidence in the record before the Board or, in an action based on a petition on which the Board failed to act, in a new proceeding before such court) (A) that the failure of the Commission to grant a petition submitted under paragraph (1) is arbitrary and capricious; (B) that the action requested in such petition is necessary; and (C) that the failure of the Board to take such action will result in the continuation of practices which are not consistent with or in accordance with this Act, such court shall order the Board to initiate such action.

"(4) A court shall have no authority under this subsection to compel the Board to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under this Act.

"(5) As used in this subsection, the term 'Board' includes any division, individual member, administrative law judge, or any other person authorized to act on behalf of the Board in any part of the proceeding for the issuance, amendment, or repeal of any order, rule, or regulation under this Act.

"(b) CONGRESSIONAL ACCESS TO INFORMATION.—(1) Whenever the Board submits any budget estimate, request, or information to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such budget estimate, request, or information to the Congress.

(2) Whenever the Board submits any legislative recommendations, testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Board to submit its legislative recommendations, testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

"(3) Whenever a duly authorized committee of the Congress which has responsibility for the authorization of appropriations for the Board makes a written request for documents in the possession or subject to the control of the

Board, the Board shall, within 10 days after the date of receipt of such request, submit such documents (or copies thereof) to such committee. If the Board does not have any such documents in its possession, it shall so notify such committee within such 10-day period. Any such notice shall state the anticipated date by which such documents will be obtained and submitted to such committee. Whenever the Board transfers any document in its possession or subject to its control to any person or any other governmental entity, it shall condition such transfer on the guaranteed return by the transferee of such document to the Board so that the Board can comply with the requirement of this paragraph. This paragraph shall not be deemed to restrict any other authority of either House of Congress, or any committee or subcommittee thereof, to obtain documents. For purposes of this paragraph, the term 'document' means any book, paper, correspondence, memorandum, or other record, including a copy of any of the foregoing.

"(c) REPRESENTATION.—(1) If—

"(A) before commencing, defending, or intervening in, any civil action involving this Act (including an action to collect a civil penalty) which the Board or the Attorney General on behalf of the Board, is authorized to commence, defend, or intervene in, the Board gives written notification and undertakes to consult with the

Attorney General with respect to such action; and

"(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Board shall have authority to commence, defend, or intervene in, and supervise the litigation of, such action (and any appeal of such action) in its own name by any of its attorneys designated by it for such purpose.

"(2) Notwithstanding paragraph (1), the Board shall have authority (in its own name, by any of its own attorneys designated by it for such purpose) to seek temporary or preliminary injunctive relief in, or to initiate the defense of, any action in which the Board has given written notification to the Attorney General under paragraph (1) (A). Such authority shall continue so long as the Attorney General fails, within the time specified in paragraph (1) (B), to assume the prosecution or defense of such action.

"(3) The Board shall exercise the authority granted by this subsection for the purpose of promoting, and in a manner which will promote, the effective enforcement of this Act. The Department of Justice shall, to the extent practicable, provide the Board with such assistance as will promote the successful and economical resolution of any civil action with respect to which the Board exercises the authority granted by

sent any person before the Board in a professional capacity.".

(f) Section 201(a)(2) of the Federal Aviation Act of 1958 (49 U.S.C. 1321(a)(2)) is amended by deleting the sentence beginning with the words "The President shall designate" and inserting in lieu thereof the following new sentence: "The President shall appoint one of the Commissioners to serve as the Chairman of the Commission and one of the Commissioners to serve as vice chairman of the Commission, by and with the advice and consent of the Senate, for a term of 3 years: *Provided, however,* That upon the expiration of a term as Chairman or vice chairman, such Commissioners shall continue to serve as the Chairman or vice chairman of the Commission until reappointed or until their successors shall have been appointed and shall have qualified. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman or Vice Chairman.".

(g) Section 203(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1323(a)) is amended (1) by inserting "(1)" immediately before the first paragraph thereof, and (2) by adding at the end thereof the following new paragraph:

the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the Board and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable.".

(d) Section 203(a) of the Federal Aviation Act of 1958 (49 U.S.C. 1323(a)) is amended by adding at the end thereof the following new sentence: "No funds appropriated under this subsection may be used to pay any claim described in section 206(a), whether pursuant to a judgment of a court or under any award, compromise, or settlement of such claim made under section 2672 of title 28, United States Code, or under any other provision of law.".

(e) Section 201(b) of the Federal Aviation Act of 1958 (49 U.S.C. 1321(b)) is amended by striking out the last sentence thereof and inserting in lieu thereof the following: "No member of the Board shall engage in any other business, vocation, profession, or employment while serving as a member of the Board, and no person who is appointed to a term as a member of the Board after the date of enactment of this sentence shall, for a period of 2 years following the termination of service as a member of the Board, repre-

sent any person before the Board in a professional capacity.".

(f) Section 201 (a) (2) of the Federal Aviation Act of 1958 (49 U.S.C. 1321 (a) (2)) is amended by deleting the sentence beginning with the words "The President shall designate" and inserting in lieu thereof the following new sentence: "The President shall appoint one of the Commissioners to serve as the Chairman of the Commission and one of the Commissioners to serve as vice chairman of the Commission, by and with the advice and consent of the Senate, for a term of 3 years: *Provided, however,* That upon the expiration of a term as Chairman or vice chairman, such Commissioners shall continue to serve as the Chairman or vice chairman of the Commission until reappointed or until their successors shall have been appointed and shall have qualified. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman or Vice Chairman.".

(g) Section 203 (a) of the Federal Aviation Act of 1958 (49 U.S.C. 1323 (a)) is amended (1) by inserting "(1)" immediately before the first paragraph thereof, and (2) by adding at the end thereof the following new paragraph:

tions and comments received under subdivision (b) and from any other source; and (2) the results of additional study and review by such agency and its employees and consultants. Such rules shall take effect 90 days after the date of submission of such final proposal.

"(d) Each duly authorized committee of the Congress shall, in the exercise of its oversight responsibility, examine, study, and take other appropriate action with respect to each initial and final proposal submitted to the Congress and referred to such committee.

"(e) The text of each initial proposal submitted under subdivision (a), and of each final proposal submitted under subdivision (c), shall be published in the Federal Register pursuant to section 553 of title 5, United States Code, and written comments thereon shall be invited. Any rule issued by the Interstate Commerce Commission which is not included in the recodified rules which take effect pursuant to subdivision (c), by the time required, shall be of no force and effect after such date. The provisions of chapter 7 of title 5, United States Code, shall apply to rules repromulgated under this paragraph.

"(f) As used in this paragraph, the term "rule" means the whole or a part of a statement of general or particular applicability which is issued or promulgated by the Interstate Commerce Commission for future effect and which is

"(3) be designed to coordinate, to make more understandable, and to modernize such rules in order to facilitate effective and fair administration thereof.

Each such submission shall include the text of such rules, as proposed to be recodified, in their entirety; a comparative text of the proposed changes in existing rules; and explanatory and supporting statements and materials. The rules, as proposed to be recodified, shall not be at variance, in any substantive respect, with the text of the rules of the Interstate Commerce Commission which are in effect or proposed as of the date of such submission.

"(b) Within 480 days after the date of enactment of this paragraph, the Administrative Conference of the United States shall submit to the Congress and to the Interstate Commerce Commission its comments on each initial proposal submitted under subdivision (a), together with any recommendations and other material which it considers appropriate.

"(c) Within 570 days after the date of enactment of this paragraph, the Chairman of the Interstate Commerce Commission shall develop, prepare, and submit to the Congress, in accordance with the requirements described in subdivision (a), a final proposal setting forth a recodification of all of the rules which such agency has issued and which are in effect or proposed, as of the date of such submission. Such submission shall reflect (1) evaluation of the recommenda-

tions and comments received under subdivision (b) and from any other source; and (2) the results of additional study and review by such agency and its employees and consultants. Such rules shall take effect 90 days after the date of submission of such final proposal.

"(d) Each duly authorized committee of the Congress shall, in the exercise of its oversight responsibility, examine, study, and take other appropriate action with respect to each initial and final proposal submitted to the Congress and referred to such committee.

"(e) The text of each initial proposal submitted under subdivision (a), and of each final proposal submitted under subdivision (c), shall be published in the Federal Register pursuant to section 553 of title 5, United States Code, and written comments thereon shall be invited. Any rule issued by the Interstate Commerce Commission which is not included in the recodified rules which take effect pursuant to subdivision (c), by the time required, shall be of no force and effect after such date. The provisions of chapter 7 of title 5, United States Code, shall apply to rules repromulgated under this paragraph.

"(f) As used in this paragraph, the term "rule" means the whole or a part of a statement of general or particular applicability which is issued or promulgated by the Interstate Commerce Commission for future effect and which is

designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice requirements of such Commission, including, but not limited to, regulations, the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, any general statement of policy, and any determination, directive, authorization, requirement, designation, or similar such action. The term does not include any order, as such term is defined in section 551 (6) of title 5, United States Code.".

(b) Section 13 (6) of the Interstate Commerce Act (49 U.S.C. 13 (6)) is amended (1) in subdivision (a) thereof by striking out in the first sentence thereof "relating to common carriers by railroads"; and (2) in subdivision (e) thereof by striking out "relating to common carriers by railroad".

(c) Section 17 (15) of the Intestate Commerce Act (49 U.S.C. 17 (15)) is amended (1) by striking out "the Committee on" and all that follows through "of the Senate" in the first sentence thereof and inserting in lieu thereof "a duly authorized committee of the Congress which has responsibility for the authorization of appropriations for the Commission"; (2) by striking out "and which relate" and all that follows through "common carrier by railroad subject to this

part" in the first sentence thereof; (3) by striking out "to such committee," and all that follows through the end of the first sentence thereof, and inserting in lieu thereof "to such committee. If the Commission does not have any such documents in its possession, it shall so notify such committee within such 10-day period. Any such notice shall state the anticipated date by which such documents will be obtained and submitted to such committee."; (4) by striking out "the preceding sentence" in the second sentence thereof, and inserting in lieu thereof "this paragraph"; and (5) by striking out the third sentence thereof.

(d) Section 16 of the Interstate Commerce Act (49 U.S.C. 16) is amended by adding at the end thereof the following new paragraph:

"(14) (a) Except as otherwise provided in subdivision (b) or (c), if—

"(i) before commencing, defending, or intervening in, any civil action involving this Act (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

"(ii) the Attorney General fails within 45 days

after receipt of such notification to commence, defend, or intervene, in, such action;

the Commission may commence, defend, or intervene in, and supervise the litigation of, such action (and any appeal of such action) in its own name by any of its attorneys designated by it for such purpose.

"(b) Except as otherwise provided in subdivision (c), in any civil action (i) relating to injunctive relief; (ii) relating to any consumer redress; (iii) to obtain judicial review of a rule, regulation, or order issued by the Commission; (iv) relating to enforcement of a subpena pursuant to, or relating to compliance with, an order under this Act; or (v) brought pursuant to section 222(b)(1) of this Act; the Commission shall have exclusive authority to commence or defend, and to supervise the litigation of, such action (and any appeal of such action) in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so. The Commission shall inform the Attorney General of the exercise of such authority. The exercise of such authority shall not preclude the Attorney General from intervening, to the extent authorized by other law, in such an action (or in any appeal of such an action) on behalf of the United States.

"(c)(i) If the Commission makes a written request to the Attorney General, within the 30-day period which begins

on the date of the entry of the judgment in any civil action in which the Commission represented itself pursuant to subdivision (a) or (b), to represent itself before the Supreme Court in such action (through any of its attorneys designated by it for such purpose), it may do so, if—

"(I) the Attorney General concurs with such request; or

"(II) the Attorney General, within the 60-day period which begins on the date of the entry of such judgment, refuses to appeal or file a petition for a writ of certiorari, with respect to such civil action, or fails to take any action with respect to the Commission's request. If the Attorney General refuses so to appeal or file, he shall notify the Commission in writing of the refusal and of the reasons for such refusal, within such 60-day period.

"(ii) Whenever the Attorney General represents the Commission before the Supreme Court in any civil action in which the Commission represented itself pursuant to subdivision (a) or (b), the Attorney General may not agree to any settlement, compromise, or dismissal of such action, or confess error in the Supreme Court with respect to such action, unless the Commission concurs.

"(iii) For purposes of this paragraph (with respect to

representation before the Supreme Court), the term 'Attorney General' includes the Solicitor General.

"(d) If, prior to the expiration of the 45-day period specified in subdivision (a) or the 60-day period specified in subdivision (c), any applicable right of the Commission may be extinguished, due to any procedural requirement of any court with respect to the time within which any pleadings, notice of appeal, or other pertinent acts must be completed, the Attorney General shall have one-half of the time prescribed in such subdivisions to comply with any such precedural requirement of such court (including any extension of such time granted by such court) (i) for the purpose of commencing, defending, or intervening in a civil action, pursuant to subdivision (a), or (ii) for the purpose of refusing to appeal or file a petition for a writ of certiorari with written notification or of failing to take any action, pursuant to subdivision (c) (i) (II).

"(e) The provisions of this paragraph shall apply notwithstanding chapter 31 of title 28, United States Code, or any other provision of law.

"(f) Whenever the Commission has reason to believe that any person is liable for a criminal penalty under this Act, the Commission shall certify the facts to the Attorney

General, whose duty it shall be to cause appropriate criminal proceedings to be brought.

"(g) The provisions of this paragraph shall not apply to any civil action commenced before the date of enactment of this paragraph.".

(e) (1) Section 2321 of title 28, United States Code, is amended in the first paragraph thereof by striking out the period at the end thereof and inserting in lieu thereof the following: ", except as otherwise provided in section 16(14) of the Interstate Commerce Act (49 U.S.C. 16(14)).".

(2) Section 2323 of title 28, United States Code, is amended (1) by striking out, in the second paragraph thereof, "The Interstate Commerce Commission and any" and inserting in lieu thereof "Any"; (2) by inserting "Interstate Commerce" immediately before "Commission, in which" in the second paragraph thereof; and (3) by striking out the first and fourth paragraphs thereof and designating the remaining two paragraphs as subsections (a) and (b), respectively.

(f) Section 11 of the Interstate Commerce Act (49 U.S.C. 11) is amended by striking out "Said Commissioners shall not engage in any other business, vocation, or employment." and inserting in lieu thereof the following: "No Commissioner shall engage in any other business, vocation, profession, or employment while serving as a commissioner,

and no person who is appointed to a term as a Commissioner after the date of enactment of this sentence shall, for a period of 2 years following the termination of service as a commissioner, represent any person before the Commission in a professional capacity.".

(g) Section 11 of the Interstate Commerce Act (49 U.S.C. 11) is further amended (1) by inserting "(1)" immediately before the first sentence thereof; and (2) by adding at the end thereof the following new paragraph:

"(2) Subsections (a) and (h) of section 2680 of title 28, United States Code, do not prohibit the bringing of a civil action on a claim against the United States which—

"(a) is based upon—

"(i) misrepresentation or deceit before January 1, 1979, on the part of the Commission or any employee thereof, or

"(ii) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof before January 1, 1979, which exercise, performance, or failure was grossly negligent; and

"(b) is not made with respect to any agency action (as defined in section 551 (13) of title 5, United States Code).

In the case of a civil action on a claim based upon the exer-

cise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable. No funds appropriated for the use of the Commission may be used to pay any claim described in this paragraph, whether pursuant to a judgment of a court or under any award, compromise, or settlement of such claim made under section 2672 of title 28, United States Code, or under any other provision of law.".

(h) Section 11 of the Interstate Commerce Act (49 U.S.C. 11) is amended by adding at the end thereof the following sentences: "The President shall appoint one of the Commissioners to serve as the Chairman of the Commission, by and with the advice and consent of the Senate, for a term of 3 years: *Provided, however*, That upon the expiration of a term as Chairman, such Commissioner shall continue to serve as the Chairman of the Commission until reappointed or until his successor shall have been appointed and shall have qualified. An individual may be appointed

as a Commissioner at the same time he is appointed as Chairman.".

(i) Section 17 of the Interstate Commerce Act (49 U.S.C. 18) is amended by adding at the end thereof the following new subsection.

"(3) Amounts appropriated to carry out the functions, powers, and duties of the Commission shall not exceed $59,850,000 for the fiscal year ending September 30, 1978, and $62,700,000 for the fiscal year ending September 30, 1979.".

SEC. 15. FEDERAL MARITIME COMMISSION.

(a) Reorganization Plan Numbered 7 of 1961 (75 Stat. 840) is amended by adding at the end of part I thereof the following new section:

"MISCELLANEOUS PROVISIONS

"SEC. 106. (a) (1) Within 360 days after the date of enactment of this section, the Chairman of the Federal Maritime Commission shall develop, prepare, and submit to the Congress and to the Administrative Conference of the United States an initial proposal setting forth a recodification of all of the rules which such Commission has issued and which are in effect or proposed, as of the date of such submission. Each such recodification proposal shall, to the extent practicable and appropriate—

"(A) recommend the transfer, consolidation, modification, and deletion of particular rules and portions thereof, including reasons therefor;

"(B) recommend changes and modifications in the organization of such rules and in the technical presentation and structure thereof; and

"(C) be designed to coordinate, to make more understandable, and to modernize such rules in order to facilitate effective and fair administration thereof.

Each such submission shall include the text of such rules, as proposed to be recodified, in their entirety; a comparative text of the proposed changes in existing rules; and explanatory and supporting statements and materials. The rules, as proposed to be recodified, shall not be at variance, in any substantive respect, with the text of the rules of the Federal Maritime Commission which are in effect or proposed as of the date of such submission.

"(2) Within 480 days after the date of enactment of this section, the Administrative Conference of the United States shall submit to the Congress and to the Federal Maritime Commission its comments on each initial proposal submitted under paragraph (1), together with any recommendations and other material which it considers appropriate.

"(3) Within 570 days after the date of enactment of this section, the Chairman of the Federal Maritime Com-

mission shall develop, prepare, and submit to the Congress, in accordance with the requirements described in paragraph (1), a final proposal setting forth a recodification of all of the rules which such agency has issued and which are in effect or proposed, as of the date of such submission. Such submission shall reflect (1) evaluation of the recommendations and comments received under paragraph (2) and from any other source; and (2) the results of additional study and review by such agency and its employees and consultants. Such rules shall take effect 90 days after the date of submission of such final proposal.

"(4) Each duly authorized committee of the Congress shall, in the exercise of its oversight responsibility, examine, study, and take other appropriate action with respect to each initial and final proposal submitted to the Congress and referred to such committee.

"(5) The text of each initial proposed submitted under paragraph (1), and of each final proposal submitted under paragraph (3), shall be published in the Federal Register pursuant to section 553 of title 5, United States Code, and written comments thereon shall be invited. Any rule issued by the Federal Maritime Commission which is not included in the recodified rules which take effect pursuant to paragraph (3), by the time required, shall be of no force and and effect after such date. The provisions of chapter 7 of title

5, United States Code, shall apply to rules repromulgated under this section.

"(6) As used in this section, the term "rule" means the whole or a part of a statement of general or particular applicability which is issued or promulgated by the Federal Maritime Commission for future effect and which is designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice requirements of such Commission, including, but not limited to, regulations, the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof, or valuations, costs, or accounting, any general statement of policy and any determination, directive, authorization, requirement, designation, or similar such action. The term does not include any order, as such term is defined in section 551 (6) of title 5, United States Code.

"(b) (1) The Federal Maritime Commission shall, in cooperation with the Secretary of Commerce, the Secretary of the department in which the Coast Guard is operating and any other interested department, agency, or instrumentality of the Federal Government—

"(A) make a full and complete review and study of the law of the United States relating to the Commission for the purpose of formulating and recommend-

ing to the Congress legislation that would better achieve the purposes for which the Commission was established by reorganization plan; and

"(B) review, study, and make recommendations for revision and codification of the statutes and other lawful authorities administered by or applicable to the Commission or otherwise set forth in title 46 of the United States Code, including the review of any existing proposals relating to the codification of such title 46; the repeal, transfer, consolidation, and modification of any particular provisions and portions thereof; any changes and modifications in the organization and structure of such title 46 and in the technical presentation of matters included therein; and such changes in the authorities delegated, the functions prescribed, and the structure and procedures mandated or authorized as the Commission believes may coordinate, make more understandable, and modernize the laws of the United States relating to shipping in order to facilitate effective and fair administration thereof and to enhance commerce and protect consumers.

"(2) The Chairman of the Commission, if three or more Commissioners agree, may appoint and compensate a qualified individual to serve as the director of the Commission's law revision activity under this subsection. Such person shall

be appointed without regard to the provision of title 5, United States Code, governing appointments in the competitive service, but at a rate not in excess of the maximum rate for GS–18 of the General Schedule under section 5332 of such title. The director shall serve as the Commission's reporter and shall, subject to the direction of the Commission, supervise the preparation of reports and the activities of applicable personnel. Individuals may be employed by the Commission on a full- or part-time basis for purposes of assisting in, or contributing to, law revision activity provided for under this subsection, without regard to the civil service laws. Any department, agency, or other instrumentality of the Federal Government shall, to the extent of available resources and upon a written request from the Chairman of the Commission, make available to the Commission such qualified personnel (with their consent and without prejudice to their position and rating), services, facilities and information as may be necessary or appropriate to assist in achieving the purposes of this subsection.

"(3) The Commission shall establish an Advisory Committee on Law Revision to advise and consult with the Chairman and other Commissioners and with its law revision staff. Except as otherwise provided in this paragraph, the members of such Advisory Committee shall be appointed by the Chairman of the Commission and shall be individuals who are

especially qualified, by reason of knowledge, experience, or training, to assist in law revision activity under this subsection. The Chairman of the Commission, the Secretary of Commerce, and the Secretary of the department in which the Coast Guard is operating (or their duly designated representatives) shall be members of such Advisory Committee ex officio.

"(4) The Commission shall invite, and afford interested persons and other governmental entities an opportunity to submit comments and recommendations with respect to some or all of the law revision activity described in subparagraphs (A) and (B) of paragraph (1). The Commission shall evaluate and consider all responses and submissions received by it with respect to such law revision activity. The Commission shall coordinate its law revision activity under this subsection with any such activity conducted by the Law Revision Counsel of the House of Representatives or the Congressional Research Service of the Library of Congress. Each department, agency, and independent instrumentality of the Federal Government shall cooperate with, assist, and make appropriate presentations, to and reviews for, the Commission.

"(5) The Chairman of the Commission shall submit to the Congress and the President—

"(A) a preliminary report with respect to law revision activity under this subsection, including a statement

indicating what, if any, additional legislative or other action is necessary to implement this subsection, not later than 6 months after the date of the enactment of this subsection; and

"(B) a final report with respect to law revision activity under this subsection, not later than 2 years after the date of the enactment of this subsection. The final report shall include the text of the proposed revision and codification; and explanation of each significant provision proposed for inclusion therein; an analysis of the economic and other consequences of such revision and codification; a discussion of significant alternatives considered but not recommended; and such other information as may be useful to the Congress. If any member of the Advisory Committee established under paragraph (3) disagrees with any matter included in the final report, such member may submit a statement setting forth the reasons for such disagreement, which the Chairman of the Commission shall include in an appendix to such report. The final report shall be designed to facilitate congressional consideration of matters relating to regulatory reform and shall be consistent with the purpose of the Congress in this subsection to clarify, simplify, and improve (both substantively and technically) the laws of the United States to shipping.

"(c) PETITIONS.—(1) Whenever, pursuant to section 553(e) of title 5, United States Code, an interested person (including a governmental entity) petitions the Commission for the commencement of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under any lawful authority granted to the Commission, the Commission shall grant or deny such petition within 120 days after the date of receipt of such petition. If the Commission grants such a petition, it shall commence an appropriate proceeding as soon thereafter as practicable. If the Commission denies such a petition, it shall set forth, and publish in the Federal Register, its reasons for such denial.

"(2) If the Commission denies a petition under paragraph (1) (or if it fails to act thereon within the 120-day period established by such pargaraph), the petitioner may commence a civil action in an appropriate district court of the United States for an order directing the Commission to initiate a proceeding to take the action requested in such petition. Such an action shall be commenced within 60 days after the date of such denial or, where appropriate, within 60 days after the date of expiration of such 120-day period.

"(3) If the petitioner, in a civil action commenced under paragraph (2), demonstrates to the satisfaction of the court (by a preponderance of the evidence in the record before the Commission or, in an action based on a petition on

which the Commission failed to act, in a new proceeding before such court) (A) that the failure of the Commission to grant a petition submitted under paragraph (1) is arbitrary and capricious; (B) that the action requested in such petition is necessary; and (C) that the failure of the Commission to take such action will result in the continuation of practices which are not consistent with or in accordance with the responsibilities of the Commission, such court shall order the Commission to initiate such action.

"(4) A court shall have no authority under this subsection to compel the Commission to take any action other than the initiation of a proceeding for the issuance, amendment, or repeal of an order, rule, or regulation under any lawful authority granted to the Commission.

"(5) As used in this subsection, the term 'Commission' includes any division, individual Commissioner, administrative law judge, employee board, or any other person authorized to act on behalf of the Commission in any part of the proceeding for the issuance, amendment, or repeal of any order, rule, or regulation under any lawful authority granted to the Commission.

"(d) CONGRESSIONAL ACCESS TO INFORMATION.—(1) Whenever the Commission submits any budget estimate, request, or information to the President or the Office of Man-

agement and Budget, it shall concurrently transmit a copy of such budget estimate, request, or information to the Congress.

"(2) Whenever the Commission submits any legislative recommendations, testimony, or comments on legislation to the President or the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

"(3) Whenever a duly authorized committee of the Congress which has responsibility for the authorization of appropriations for the Commission makes a written request for documents in the possession or subject to the control of the Commission, the Commission shall, within 10 days after the date of receipt of such request, submit such documents (or copies thereof) to such committee. If the Commission does not have any such documents in its possession, it shall so notify such committee within such 10-day period. Any such notice shall state the anticipated date by which such documents will be obtained and submitted to such committee. Whenever the Commission transfers any document

in its possession or subject to its control to any person or any other governmental entity, it shall condition such transfer on the guaranteed return by the transferee of such document to the Commission so that the Commission can comply with the requirement of this paragraph. This paragraph shall not be deemed to restrict any other authority of either House of Congress, or any committee or subcommittee thereof, to obtain documents. For purposes of this paragraph, the term 'document' means any book, paper, correspondence, memorandum, or other record, or any copy thereof.

"(e) REPRESENTATION.—(1) If—

"(A) before commencing, defending, or intervening in, any civil action involving any lawful authority granted to the Commission (including an action to collect a civil penalty) which the Commission or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

"(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Commission shall have authority to commence, defend or intervene in, and supervise the litigation of, such action

(and any appeal of such action) in its own name by any of its attorneys designated by it for such purpose.

"(2) Notwithstanding paragraph (1), the Commission shall have authority (in its own name, by any of its own attorneys designated by it for such purpose) to seek temporary or preliminary injunctive relief in, or to initiate the defense of, any action in which the Commission has given written notification to the Attorney General under paragraph (1) (A). Such authority shall continue so long as the Attorney General fails, within the time specified in paragraph (1) (B), to assume the prosecution or defense of such action.

"(3) The Commission shall exercise the authority granted by this subsection for the purpose of promoting, and in a manner which will promote, the effective enforcement of the authorities granted to the Commission. The Department of Justice shall, to the extent practicable, provide the Commission with such assistance as will promote the successful and economical resolution of any civil action with respect to which the Commission exercises the authority granted by this subsection, and the Commission shall cooperate with such department in all other actions.

"(4) The provisions of this subsection shall not apply to any civil action commenced before the date of enactment of this subsection.

"(f) ACCOUNTABILITY.—Subsections (a) and (h) of section 2680 of title 28, United States Code, do not prohibit the bringing of a civil action on a claim against the United States which—

"(1) is based upon—

"(A) misrepresentation or deceit before January 1, 1979, on the part of the Commission or any employee thereof, or

"(B) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof before January 1, 1979, which exercise, performance, or failure was grossly negligent; and

"(2) is not made with respect to any agency action (as defined in section 551(13) of title 5, United States Code).

In the case of a civil action on a claim based upon the exercise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable.

No funds appropriated for the use of the Commission may be used to pay any claim described in this subsection, whether pursuant to a judgment of a court or under any award, compromise, or settlement of such claim made under section 2672 of title 28, United States Code, or under any other provision of law.".

(b) Section 102 of Reorganization Plan Numbered 7 of 1961 (75 Stat. 840) is amended by adding at the end thereof the following new subsection:

"(e) No Commissioner shall engage in any other business, vocation, profession, or employment while serving as a Commissioner, and no person who is, on or after May 11, 1976, a Commissioner shall, for a period of 2 years following the termination of service as a Commissioner, represent any person before the Commission in a professional capacity.".

(c) Section 102(b) of Reorganization Plan Numbered 7 of 1961 (75 Stat. 840), as amended by this Act, is amended by replacing subsection (b) with the following new subsection: "The President shall appoint one of the Commissioners to serve as the Chairman of the Commission, by and with the advice and consent of the Senate, for a term of 3 years: *Provided, however,* That upon the expiration of a term as Chairman, such Commissioner shall continue to serve as the Chairman of the Commission until reap-

pointed or until his successor shall have been appointed and shall have qualified. An individual may be appointed as a Commissioner at the same time he is appointed as Chairman.".

(d) Section 106 of Reorganization Plan Numbered 7 of 1961 (75 Stat. 840), as amended by this Act, is further amended by inserting at the end thereof the following new subsection:

(g) Amounts appropriated to carry out the functions, powers, and duties of the Commission shall not exceed $8,715,000 for the fiscal year ending September 30, 1978, $9,130,000 for the fiscal year ending September 30, 1979, and $9,545,000 for the fiscal year ending September 30, 1980.".

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 11, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to the Committee's request for our views on S. 263, the "Interim Regulatory Reform Act of 1977."

S. 263 would require the seven regulatory agencies subject to the oversight responsibility of your committee to recodify all existing rules and regulations without substantive change, as well as review their existing statutory authority and recommend appropriate changes. In addition, the bill would mandate promopt response by the affected agencies to petitions for the issuance, amendment, or repeal of rules and regulations, require the simultaneous transmission of the budgetary or legislative recomendations to the President (or the Office of Management and Budget) and the Congress, and provide civil litigating authorities for those agencies which do not now have such authority. Other provisions of S. 263 would provide for the appointment of an agency chairman for a fixed term, strengthen existing conflict of interest rules to prevent former agency members from exploiting past relationships with the agency, and place the agencies' employees engaged in investigative, inspection, or law enforcement functions under the protection of the Federal criminal code. Finally, S. 263 contains appropriations authorizations for each agency for fiscal years 1978, 1979, and 1980.

We have reviewed the testimony of the affected agencies on this legislation. Our comments address only those provisions of special concern to this office.

Recodification of existing rules and regulations

The President has expressed his concern about the complexity of regulations promulgated by the agencies; we agree with bills intent that agency regulations ought to be consistent, precise and in "understandable English" and that agencies should constantly subject their rules and regulations to regular reexamination. However, we do not believe that the provisions of S. 263, which mandate a costly editorial revision of complex programs, will contribute to this objective. Likewise, the time constraints imposed in the bill's schedule for recodification of existing and proposed rules are too severe to permit thorough and well-considered review and revision of existing rules, as well as development of meaningful comment (and agency review of comments) by the Administrative, Conference, the Congress, and the interested public.

We believe the preferable approach to requiring periodic review of agency regulations is in the context of Sunset reviews, such as those mandated by S. 2. Should such legislation become law, all agency programs will be periodically subject to a thorough reexamination by both the President and the Congress. If a statutory mandate is necessary for an agency to recodify its regulatory program, it should be done on an individual agency basis, and after that agency's program has been thoroughly reexamined under Sunset procedures.

Law revision

S. 263 would direct each of the seven agencies to conduct a three-year full review of the statutory and case law relating to the agency and to make recommendations to the Congress for revision and codification of the statutes. The purpose of the study and recommendations is to facilitate congressional consideration of regulatory reform and to clarify, simplify, and improve applicable law, both substantively and technically.

We agree that agency mandates should be subject to periodic and full review, and the Sunset concept is intended to do this. Likewise, a primary responsibility of any Government agency is to continually reexamine its statute and, if necessary, propose legislation to correct existing statutory deficiencies in its program; any agency not doing this would be lax in its responsibility to effectively and fairly administer its laws.

In this connection, comprehensive reviews of the statutory authority of the Civil Aeronautics Board and the Federal Communications Commission are underway in the Committee and in the House Subcommittee on Communications.

The language in S. 263, however, so overlaps those initiatives that it should be coordinated with them, rather than be enacted separately. Similarly, the Federal Power Commission functions are proposed to be shifted to a new Department of Energy. In our view, any major overhaul of the statutory functions of the Federal Power Commission should be referred until that major energy reorganization effort has been completed.

Congressional access to information

S. 263 would also establish a uniform requirement that the agencies covered transmit to the Congress copies of budget information, legislative recommendations, testimony for congressional hearings, and comments on legislation at the same time such materials are transmitted to the President or to the Office of Management and Budget. The bill further provides that no officer and no other agency of the United States shall have authority to require these agencies to submit legislative recommendations or comments for approval, comments or review prior to their submission to Congress. We are opposed to these provisions.

The basic problem with requiring agencies to submit their budgets to the Office of Management and Budget and Congress concurrently lies in the timing of the submission of budget information to the Congress. The budgets of individual agencies—including the independent regulatory commissions—have important relationships with those of other agencies and programs of the Government. Such relationships cannot be seen or evaluated until the entire budgetary picture is revealed when the President sends his Budget to the Congress. Premature disclosure of individual agency budget requests could force the Congress to conduct a narrowly-focused, disjointed consideration of such requests.

The Office of Management and Budget supports the sharing of agency budget requests with the Congress after the President's Budget has been transmitted to the Congress. The heads of agencies may provide information concerning their budget requests to the President when the Congress asks for this information in connection with its consideration of the President's Budget. Additionally, provisions of the Congressional Budget and Impoundment Control Act of 1974 provide a statutory right of Congress to obtain the appropriate data and information which the Congress may need for its budgetary decisions.

Rather than encouraging procedures whereby Congress receives some agency budget information in a piecemeal fashion, we would urge instead that the President and the Congress continue to work together to develop ways in which the budget process as a whole can be improved. We look forward to our joint consideration of the possibility of instituting zero-base reviews of government programs and anticipate that significant budget reform can be achieved through these efforts.

Similarly, the Office of Management and Budget's legislative review and coordination function is intended to assist the President (or his policy representatives) in developing and presenting a coherent, coordinated legislative program and coordinated views on pending legislation. Coordination by the Office of Management and Budget of legislative proposals and positions by the various agencies serves several important purposes for the Administration, individual agencies, and the Congress: (a) it provides a mechanism for development of a coherent legislative program for the President; (b) it encourages the various agencies to take the problems and concerns of other agencies into account; (c) it facilitates the development of a consistent Administration position on legislation; and (d) it assures that the Congress gets coordinated and informative agency views on legislation under consideration.

Moreover, legislative communications may be submitted to the Congress without prior coordination by this Office where time limitations do not permit such coordination to be achieved. As a result, agencies are not and have not been precluded from taking timely positions on legislation pending in the Congress.

We believe that both the President and the individual agencies benefit from this service and that all agencies should have access to it.

Avoidance of conflict of interest

The bill contains several provisions which preclude former members of the agencies from practicing or representing any person before their respective agencies for two years after they leave office. As you know, the President transmitted to the Congress on May 3, 1977 his proposal entitled the "Ethics in Government Act of 1977", which calls for a three-part program of financial disclosure for

senior Executive branch officials, creation of a new Office of Ethics in the Civil Service Commission and strengthened restrictions on post-employment activities of Executive branch officers and senior employees. Specifically, the President proposed:

(1) An extension of the current prohibition on appearances before an agency of former employment on matters that were under the official's responsibility:

By extending the period of the prohibition from one year to two; and

By including informal as well as formal contacts.

(2) A new and broader ban on formal or informal contact on other matters with agencies of former employment, for a period of one year after the end of government service.

In our view, post-employment restrictions designed to prevent the misuse of influence acquired by Government officials should be broadly applied to all senior Executive branch officials. Therefore, we urge that consideration of the conflict of interest provisions in S. 263 be deferred and that the proposed Ethics in Government Act be enacted instead.

Appropriations authorizations

S. 263 would authorize appropriations for fiscal years 1978, 1979, and 1980 for the Federal Communications Commission, Federal Power Commission, Civil Aeronautics Board, Interstate Commerce Commission, and the Federal Maritime Commission. We believe it premature to reach judgments on the appropriate authorization amounts in 1979 and 1980 before the President's Budget for those years. Therefore, we suggest that the committee consider 1979 and 1980 authorizations for each agency of "such sums as may be necessary."

With respect to the provisions establishing civil litigation authority for the agencies, limiting the appointment and tenure of agency chairmen, providing for the hiring of civil suits against the agencies for alleged malfeasance or nonfeasance, and including certain personnel of the agencies under the protection of the Federal criminal code, we defer to the views of the Department of Justice. However, if the bill's provisions regarding the term of office and the appointment and removal of agency chairmen would restrict the President's power to select a chairman or remove him from that office, we strongly oppose these provisions. We urge the Committee to request and consider the additional views of the Department of Justice on this legislation before taking action.

Sincerely,

JAMES M. FREY,
Assistant Director for Legislative Reference.

Senator FORD. We will now proceed with the ICC.

Mr. CLAPP. Thank you.

STATEMENT OF HON. CHARLES L. CLAPP, ACTING CHAIRMAN, INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY A. DANIEL O'NEAL, CHAIRMAN DESIGNATE; ROBERT BROOKS; AND MARK EVANS

I am Charles L. Clapp. On my right is A. Daniel O'Neal of the Commission, the Chairman-designate. I had hoped he would be named chairman on Friday so he could represent the Commission today.

To his right is Robert Brooks, the Director of our Office of Proceedings. To my left is Mark Evans, the General Counsel of the Commission.

The Commission is pleased to have this opportunity to express its views on those provisions of S. 263, the Interim Regulatory Reform Act of 1977 which affect the ICC. The bill would bring Commission personnel under protection of 18 U.S.C. 1114, which makes it a Federal offense to kill designated Federal officers and employees

while in the performance of their duties. Of equal importance is the cross reference to the above section in 18 U.S.C. 111, which includes all those named in 18 U.S.C. 1114, providing stiff penalties for those convicted of assaulting, resisting, or otherwise impeding the named Federal employees in the performance of their duties. The Commission has repeatedly requested this protection for its employees. We heartily support this provision.

Section 14(a) would require the Chairman of the ICC to prepare an initial proposal setting forth recodification of all its "rules" and to submit that recodification to the Congress and to the Administrative Conference of the United States within 360 days of the enactment.

The very volume of regulatory agency rules presents a formidable picture: The ICC's regulations comprise over 1,500 pages in the Code of Federal Regulations. There probably are items in those regulations that are out of date or almost never invoked. No doubt there are duplications, and there is language that could be clarified. We would like to stress, however, that our rules are constantly being revised. The Commission's regulations in October 1975, consisted of 145 individual sections, 59 of which, or over 40 percent, have been the subject of review and amendment since that date. Moreover, the Commission's regulations were completely revised and recodified in 1967, following the creation of the U.S. Department of Transportation and the consequent transfer of jurisdiction over matters such as safety. We submit that a complete recodification of our rules is not required at this time.

The Commission recognizes the need for constant vigilance on the part of every governmental body to keep its rules and regulations up to date, internally consistent, understandable, and as short and simple as possible. But while we fully support the goals of section 14(a) of S. 263, we question whether a 1-year crash program of agency rules recodification is the best way to achieve those goals. Given the volume, we fear that little more than a superficial review could be accomplished. The same problem would face the Administrative Conference and members of the public, which would be called upon to comment on recodified rules from several agencies simultaneously.

I suspect that Congress also would be hard pressed to do an effective job of reviewing these proposals in 90 days.

We think that a better way to tackle recodification would be on a more gradual, but regular, basis. The Congress could require that each agency provide for approval a schedule according to which all rules of a particular category would be reviewed and recodified regularly, with the review of the entire body of agency rules taking place once every 3 to 5 years, depending upon the volume of regulations involved. The schedule submitted by the agency would become effective within a given time in the absence of congressional disapproval. Rules not recodified according to the schedule would automatically cease to be effective.

Subsections 14 (b) and (c) extend to all modes of surface transportation the provisions of the 4R Act that insure expeditious initial action on rulemaking petitions and provide for timely delivery of

documents from the Commission to the Congress. We support such an extension.

Section 14(f) would amend section 11 of the act to add that:

> No person who is appointed to a term as a Commissioner after the date of enactment of this sentence shall, for a period of two years following the termination of service as a Commissioner, represent any person before the Commission in a professional capacity.

The Commission believes this amendment may not accomplish its aim.

It is intended to perform the important function of eliminating conflict of interest situations that might develop in the transition from a Commission position to a post in the private sector. There is question that representation by a former Commissioner of a party to a proceeding before the Commission of which the ex-Commissioner previously was a member has the potential for conflicts of interest. The possibility exists that the opportunity for postagency employment could influence an individual during his service with the Government, and there is also the greater possibility that former Commissioners would exert undue influence on those with whom they have had a previous close association. The extent of such influence would vary with individuals and may depend more on the integrity of the Government employee than on any other factor. The quality of the individual in Government is critical.

Section 14(f) makes no distinction between Commissioners who leave the agency voluntarily in the middle of a term and those who leave involuntarily, at the end of fixed terms or upon a change in administration. Even the one statutory prohibition that presently exists on this subject, section 4(b) of the Communications Act, which the S. 3308 report indicates is the model for new provisions, provides that its restriction on representation—which only extends for a year— "shall not apply to any Commissioner who has served the full term for which he was appointed." This exception is well advised since it may be unfair to place broad limitations on the future employment of a Commissioner who has served his term and is not leaving the agency voluntarily.

The prohibition also suffers from being ambiguous and subject to different interpretations.

The possibilities for conflict of interest are already addressed elther by statute or in the case of this agency at least, by Commission rule. These provisions include 18 U.S.C. 207, which precludes former agency employees or members from acting as agents or attorneys in connection with proceedings in which they participated as an agency employee or members and from appearing personally within 1 year after their employment ceases.

Similarly, Canon 9–101 of the code of professional responsibility of the American Bar Association provides that a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee. Moreover, section 17 of the Commission's Canons of Conduct for Members or Employees [49 C.F.R. 1000.735–17] provide that no Commission member or employee should participate in any matter involving a party with whom he is negotiating for future employment.

Another series of relevant prohibitions are the Commission's rules against ex parte communications—section 18 of the Commission's Canons of Conduct and appendix C of the Commission's general rules of practice. These rules prohibit ex parte communications of any kind between Commission personnel and parties involved in on-the-record proceedings, such as ex-Commissioners, on the merits of any proceeding in which the Commission personnel are involved. Similar prohibitions are contained in section 4 of the recently enacted Government in the Sunshine Act.

If, the employment prohibition contained in subsection 14(f) is to be retained, it seems desirable for Congress to offset, in some way, the disincentive that this provision creates. A majority of the Commission believes that one step might be to establish a system under which ex-Commissioners receive all or part of their Commissioner salaries during the period when their employment opportunities are restricted.

In my statement you will find my dissent from that view as well as the dissent of Commissioner Christian. There may be other benefits that would help to balance out the detrimental effect of subsection 14(f) but the subsection standing alone could well make it increasingly difficult to recruit top flight regulatory agency members.

In sum, we think that the limitations on employment contained in S. 263 on balance run counter to the public interest. At a minimum, any such prohibition should be limited to those Commissioners who resign from office prior to the expiration of their terms and should provide authority for some person, such as the Attorney General, to grant a waiver in exceptional circumstances.

Subsection 14(g) contains an additional amendment to section 11 of the act, which would limit the instances where the agency could invoke the defense of sovereign immunity in certain tort actions.

These new provisions would be put into effect for a trial period ending on January 1, 1979. The Commission believes that the proposed changes are justified subject to review of the results during the trial period.

Subsection 14(h) of S. 263 would also amend section 11 of the Interstate Commerce Act, and require the President to obtain the advice and consent of the Senate when naming the Chairman of the ICC, Since any new Commissioner is now appointed with the advice and consent of the Senate, this provision would affect on a President's choice of a sitting Commissioner as Chairman—a new Commissioner under this subsection could still be made a Commissioner and Chairman at the same time—by making him undergo Senate scrutiny a second time.

Appointment as Chairman would be for three years, but upon expiration the Chairman would continue to serve as such until reappointed or until his successor is appointed and qualified. This conforms to a current provision to section 11 of the Interstate Commerce Act that allows sitting Commissioners to continue to serve until they are reappointed or replaced.

There are several advantages to this proposal. First: Setting a definite term for the Chairman guarantees at least some period of continuity of leadership, even if there is a change in administra-

tion. Second: In the case of a sitting Commissioner, it provides an opportunity for the Senate, and thus the public, to scrutinize the candidate's record of service with the agency, prior to his assuming the Chairmanship.

Third: The proposal allows the President to retain a Chairman indefinitely after his term has expired, without requalification by the Senate.

There are some drawbacks to this plan, such as the fact that it will be time consuming and sometimes of dubious value to rescrutinize a sitting Commissioner for appointment as Chairman. But on balance, it appears that the advantages outweigh the disadvantages.

Subsection 14(i) would set appropriations ceilings for the Commission not to exceed $59,850,000 for the fiscal year ending September 30, 1978, and $62,700,000 for the fiscal year ending September 30, 1979. The Commission believes these ceilings to be unfortunate, and to pose the very real possibility that vital programs will not be undertaken, and that those undertaken or now in existence may be so severely hampered as to be ineffective.

The Commission recently appeared before the Subcommittee on Transportation of the Senate Committee on Appropriations to discuss the ICC's budget request for fiscal year 1978, which is $67,504,000. There, as now, we emphasized that in formulating our 1978 budget request, we realized the need to improve the quality of regulation while minimizing our budget request.

The ceiling would make completion of the following important goals difficult: a substantial enhancement of our restructured compliance program, expansion of consumer protection and assistance, reduction of regulatory lag and increased use of economic analysis in the decisionmaking process.

There is further discussion in our statement expanding on these four points and others. But in the interest of time I will submit that for the record.

Thank you very much.

Senator FORD. Thank you.

Your statement will be included in the record.

You expressed concern in your statement as to the timetable for recodification of the rules and provisions. You said your regulations comprise 1,500 pages of the Code of Federal Regulations.

This provision was originally proposed by Senator Pearson after he heard the testimony from the hazardous materials transportation office describing how they had cut the volume of their regulations by more than one-third from the original 1,400 pages which they too comprised.

The hazardous materials transportation office has a much smaller staff than does the Commission.

Why were they able to accomplish this objective with such apparent ease and you foresee such grave problems with the bulk of regulations and the timetable?

Mr. CLAPP. The Commission has had its regulations under continuous review. We are presently in the process of revising our rules of practice. This is a continuing process. What we are suggesting is not that it be done but that it be done on a gradual basis so that full

attention can be given to the various rules. These three books comprise our rules. They are extensive and complicated. We want to do the best job for the public and we believe that it would be more orderly to proceed as we have suggested. But we do agree that continuous review is an important element in our work.

Senator FORD. You speak at great length in your statement about "the pocketbook" issue in S. 263. The restrictions on representation before the Commission after termination of service as Commissioner. I want to make a couple of points and then ask for your comments on those.

One: The President is requiring of his appointees an even more stringent standard than that proposed in the bill. Yet he does not seem to have difficulty finding qualified people to serve in various positions.

Second: The Chairman of the Consumer Product Safety Commission (CPSC) will testify later this morning that the provisions meet with the acceptance of that body, and as a matter of fact, the CPSC has an even broader application of the provisions in its existing statute although for a shorter period of time than in the proposed bill. What are your comments on these situations?

Mr. CLAPP. It has appeared to me that the administration has been moving somewhat slowly in filling the top positions. I don't know whether this can be attributed in any part to the reluctance of various individuals to serve, and if that is true, I don't know why they are reluctant to serve; whether it relates to this kind of prohibition or other specifications which have been set forth by the President relating to service after leaving a commission. That well could be a factor, I think.

Again, I think that various agencies may feel that there are more problems than others. We, as a group, have felt that we have a number of provisions in our own rules and in statutes applicable to us which deal with this conflict of interest problem. We believe that it is important to get good people for the agencies. We would hate to think that many good individuals were dissuaded from willingness to serve because of these requirements.

It is a matter of judgment obviously as to whether 1 year or 2 years is the proper time. But there are, as I recognize, important divisions within the commissions, on this subject.

Senator FORD. Maybe Commissioner O'Neal should answer the next question because he will be the next chairman.

Many people suggest that the ICC should bave fewer commissioners, say, 5 or 7 or 9 rather than the 11. Could the ICC function with fewer commissioners?

Mr. O'NEAL. I think the Commission can function very well and probably better with fewer commissioners. I would think the reduction to seven would be a good number to begin with. I think there have to be some—there should be some consideration given to individuals so that nobody is injured in any serious way but I would think that for an improvement in the function of the agency that seven would be a good number.

Mr. CLAPP. If I may add, Mr. Chairman, I agree completely with

that. A year ago in replies to responses to questionnaires submitted by Chairman Moss both Commissioner O'Neal and I expressed the view that the Commission might even benefit from a reduction in size. I believe that seven would be a satisfactory figure.

Mr. O'NEAL. I would like to go back to the previous——

Senator FORD. We ought to get about reducing it then.

Mr. O'NEAL I would like to go back to the previous question for a moment. The concern that I think a majority of the Commission have about restriction on employment after leaving the Agency is a sincere one. It goes to the question of whether you can persuade qualified people to take these positions. This is the answer to improving the Government, getting the right people in these jobs. The concern was greater before the salary increase went into effect. With the restrictions in the past you were asking people to come into Government, to take a significant reduction in pay, given the outside incomes, and on top of that placing a limitation on what they can do after they leave the Agency. It's difficult for people to make that kind of commitment. The situation is somewhat different now.

I had to sign one of these commitments to the White House so I'm not personally—so I won't personally be affected by this amendment but I do think that it is something the committee ought to give some more serious consideration to. There may be other ways of doing this without placing a restriction on an individuals's income. One of them that seems to make sense would be to require the publication of any contacts between former commissioners and anybody in the Agency for a period of 2 or 3 years. I'm not sure what the time limit would be. But it would seem to me that kind of restriction certainly would have no impact on a person's ability to earn income after he leaves the Agency.

But what troubles me is that we may be heading in a direction where you must be either wealthy or committed to being a bureaucrat before you take one of these positions.

Senator SCHMITT. That is all right. That is what the Congress has done to itself. I am being facetious.

Senator FORD. No, you are being honest.

Senator SCHMITT. I am being facetious in saying it is all right. I don't agree with it—I don't know that this amendment as written will cause that much trouble.

Senator FORD. The problem we want to get here, I think, if I interpret the intent is that we see people leaving and forming a firm downtown and they have all of the background and knowledge and have reviewed all of the cases and they open up their doors downtown and it is obvious that they can become a primary operation for those with problems before the ICC. It indicates once you build up something that you can run downtown, hang your shingle and start a business. We want to prevent this type of thing from happening. I don't believe there is a provision in the bill that would prevent informal advice to a client, only formal representation before the Commission. It doesn't mean you couldn't be hired to go to a firm and be there as their expert for advice and counsel within the firm. But you could not represent them formally before the Commission.

It seems we have to hit a balance here where you as an individual could be in a position of informally advising the individual that would be representing the client formally before the Commission.

Mr. O'NEAL. I don't have any real big problem with the way this is drafted right now. I thought it was worthwhile to throw out some of the concerns, some of the things to think about.

Senator FORD. My time is up.

Senator.

Senator GRIFFIN. I will pass to anybody on my right that may be ready to ask some questions.

Senator SCHMITT. I have two or three questions that concern me in this whole area of regulatory reform. I am very much attuned to the need for reform if only because the lives of every individual in our country is being affected by regulations now far more than the Founding Fathers ever envisioned and certainly far more than was the case a few years ago.

Do you feel that the recodification of regulations that you undertook, I believe you said in 1967 and subsequently, have resulted in regulations that are accessible and understandable to the public that has to live with them.

Mr. CLAPP. There is always room for improvement obviously. As we indicated, since October of 1975, 40 percent of those rules have been recodified. And we are making—we are setting goals of 10 percent in terms of paperwork reduction. We believe that we can meet that in the next year. It is a different slant on it but we are making efforts to make things understandable. We are presently, as I indicated in the testimony, revising our rules of practice. I agree with you that it is very important that the consumers and clients of the Commission be able to understand our rules. Otherwise enforcement becomes difficult if not impossible.

Senator SCHMITT. What if I wrote to the Commission and asked as a user, not as a Senator, for a systematic compilation of all Commission regulations that related to energy. What would I get back by such a question?

Senator FORD. Probably a long delay.

Mr. CLAPP. I am not sure but Iwould hope you would get something that would enable you quickly to see the kind of things we were doing associated with the energy problem. I don't believe it would take too long a period to provide you at least with the basic information.

Mr. O'NEAL. I think it would be a bit of a problem. The code of regulations is not indexed at the present time with an energy heading. Let's face it, the Interstate Commerce Commission has functioned under the Interstate Commerce Act. We haven't had until recently an energy override that says the agency should be directing more of its attention at energy considerations and trying to fit in economic regulation with energy problems. The agency, however, has had two or three very important efforts in recent years which of course we could come up with rather quickly. But to give you a total list I am not sure how much time it would take because we are not indexed that way. It would take a little effort.

Senator SCHMITT. How are you indexed? What kind of question could I ask? Could I ask for all regulations dealing with trucking? Would I get an answer back to that?

Mr. O'NEAL. You could ask for that sort of thing. Just looking here at the volume, part 1199, you could ask for information on enforcement, on carriers subject to part 1, which are railroads. It could be broken down that way without problem. It is a question of how you get into the information.

Senator SCHMITT. That is what is bothering the citizens of New Mexico. If I wanted to start a small trucking company that were to cross State lines, how would I get hold of the rules and regulations?

Mr. CLAPP. We have issued a pamphlet which is brief and gives instructions on how to do that. We have provided specific staff in the regional and field offices who are there to deal with this problem, who could meet with the individual and give him or her guidances as to how to proceed.

Mr. O'NEAL. That is a fair question. We have started within the agency to look to how we can provide better information to small businesses that come into the regional offices or the office here in Washington, D.C.

That is not yet really underway. But I have asked to have a preliminary look at whether we can now with the greater computer technology available to the agency, if we can't provide better information not only to the small carriers, but to the small shippers.

Mr. CLAPP. We have stepped up our participation in seminars and the 2- or 3-day meetings sponsored around the country by the Small Business Administration.

We have representatives there to assist people who are interested in entering fields associated with the Commission.

Senator SCHMITT. Prior to the issuance of a new regulation, does the Commission specifically evaluate whether the regulation is consistent with other Federal regulations from other agencies or within your own agency—I'm sure you do it within your own—and does it look at the economic impact including paperwork that the regulation may have on the public, and the judicial impact on the courts. Are these things you go into before finally approving a regulation for issuance?

Mr. CLAPP. We have been participating as a member of the Paperwork Commission which is coordinating many of these efforts. I think in all honesty it varies from issue to issue. An attempt obviously is made by the Commission to gage the impact of our proposals on other modes and other activities. I think that is one factor in the need for increasing intermodal action.

I would hope one of the things the DOT will do will be to increase this activity.

A decision affecting one mode often has an impact on others.

Senator SCHMITT. I know that is necessary within government. I'm thinking about the evaluation of the total impact on a small business community of a particular regulation you may be implementing

or the impact on the Federal courts throughout the country, of a particular regulation.

Do you make a special effort to do that or do you leave it to those other groups to first of all, become aware of the regulation and, secondly, to decide how much will I have to take this regulation into account in doing the daily, monthly, yearly business.

Mr. CLAPP. If we do adopt regulations that have an injurious effect, then there is little time lost in hearing from truckers or the industries affected about the impact of that.

There are efforts made, obviously, to rectify that.

Senator SCHMITT. But you depend on the community to scream once the regulation is passed, rather than finding out whether they are going to scream.

Mr. CLAPP. We try to do both. In my opinion, we need to devote more attention to an aggressive survey of the situation in various fields.

I'm not saying we don't ever do it. We do it. But, in my opinion, we need to be more active in a positive way in this area.

Mr. O'NEAL. I think that is right. The agency has tended to be passive and to rely basically on submissions of parties before deciding which direction to go, and whose interests are affected.

It is difficult for an agency the size of the ICC, with as many carriers as we regulate and as many diverse interests as are affected by the agency, to keep track of everything.

But we—I know I have a much greater concern about bringing to bear the agency's expertise on the decisionmaking process. The Bureau of Economics, for example, should be used to a much greater extent to develop economic information which will provide some assistance in making a rational decision.

There are affected groups that might not be well represented. If you rely on the parties that know about the proceeding you are not always going to pick up everyone that is affected.

This, of course, is another reason for having a public counsel at the ICC. The agency itself approved one in 1975. The Congress has now imposed one for rail—a rail public counsel. I hope that some time soon, we will have a working effective counsel. He can play that same kind of role, I think, helping to develop a record, whether or not the affected parties are represented.

Senator SCHMITT. Thank you, Mr. Chairman.

Senator FORD. Senator Danforth?

Senator DANFORTH. Section 6 provides that whenever the Commission submits any budget estimate, request, or information to the President or the Office of Management and Budget, it shall concurrently transmit a copy of such budget estimate, request or information to the Congress.

Do you have any comments on that section?

Mr. CLAPP. That is a recent section, and we welcomed it.

Senator DANFORTH. You welcomed it.

Mr. CLAPP. You understand we do that now.

Senator DANFORTH. You do it now.

Mr. CLAPP. Yes.

Senator DANFORTH. Do all agencies do it or is this a peculiarity of the ICC?

Mr. O'NEAL. This was a result of the Rail Act which was passed on February 4, 1976.

Senator DANFORTH. It is peculiar to the ICC?

Mr. O'NEAL. Yes, maybe so.

Senator FORD. It also is provided in the Product Safety Act.

Mr. CLAPP. Our experience with it has caused no problems for us. We welcomed the opportunity to make this information available to the Congress at the same time.

We supported that provision.

Senator DANFORTH. Each year you make up your own analysis of what your requirements are going to be for the succeeding year; is that right?

Mr. CLAPP. Yes.

Senator DANFORTH. And then you submit your budget requests to OMB; is that how it works?

Mr. CLAPP. Yes; we do submit those to OMB.

Senator DANFORTH. Then, over the past history, typically, the administration then makes some cuts in your budget. Would that typically be the case?

Mr. CLAPP. They have been known to do that; yes.

Senator DANFORTH. What would be the average cut that the administration would make in your budget?

Mr. CLAPP. I'm told in terms of personnel in particular areas it might amount to 75 or 80 percent of the additional positions requested

Senator DANFORTH. That is in specific areas?

Mr. CLAPP. Yes.

Senator SCHMITT. That is the cut.

Mr. CLAPP. Proposed cut.

Senator FORD. Of the increase?

Mr. CLAPP. If you are asking for 100 additional spots you might lose 70.

Senator SCHMITT. Would you yield for clarification? Do you get target figures prior to your request from the OMB? Many agencies do. Do you get target figures prior to your submitting a request?

Mr. CLAPP. We have continuing conversations with members of the OMB staff, but we are not really told in advance what we should submit.

Senator DANFORTH. Well, in any event, the procedure, as it normally is, is that you make up your budget request which is usually higher than what it was in the present year; is that a fair statement?

Mr. CLAPP. Yes.

Senator DANFORTH. Then you submit that to OMB and they typically cut it down; right?

Mr. CLAPP. Correct.

Senator DANFORTH. Prior to the last year, your budget request that was submitted to OMB was not a public document, and was not submitted to Congress, right?

Mr. CLAPP. Not at the same time, Senator; yes, that's correct.

Senator DANFORTH. Not at the same time, or was it ever?

Mr. CLAPP. It seems to me that often in committee questioning, the representatives of the Commission are asked what they requested and in this way, the information is generally elicited.

Senator DANFORTH. That would be on a piece-by-piece basis, correct?

Mr. CLAPP. It might be the overall budget and it might be for specific programs; yes.

Senator DANFORTH. Is it accurate to say that prior to 1976, the Congress and the committee was not armed with the information that was called for beginning in 1976?

Mr. CLAPP. Certainly at the very least, they didn't have the information early, and all in one piece. So they were not equipped to move as quickly.

Senator DANFORTH. Just as a matter of how the game is played, once OMB establishes its budget, when that comes down, I take it you see it for the first time, and there is usually disappointment in the agency, is that correct?

Mr. CLAPP. Yes.

Senator DANFORTH. Now the way the game is played, would it be typical for the agency then to rush to Congress or to the Appropriation Committee or to friendly people in the Congress and to say, "Hey, we have really been robbed by OMB. We put in a budget request for x dollars, and all they gave us was x minus y, and here is the documentation we submitted."

Would that be typical? Or in the alternative, is there kind of a sense of team play, that once OMB has established your budget, you should fight that out with OMB, but you should not then go over their heads or behind their backs and lobby the Congress yourself?

Mr. CLAPP. Certainly there would be discussion with OMB, and we would try to persuade them that our position was the correct one. Then I would hope that before we went to the Congress or friendly Members or people, that we would reassess the need in that particular area, and beef up our justifications, if we really thought that those needs were not being met by OMB.

Senator DANFORTH. Was it typical before 1976 to go over the head of OMB and to make your appeal directly to Congress?

Mr. CLAPP. This is John Kratzke, Acting Managing Director of the Commission who would like to answer that question.

Mr. KRATZKE. The original tradition has been that we defended the President's budget, unless a request came from one of the committees who had jurisdiction on a given item. By executive order and by the budgetary statute we are required or had been required to defend the budget as submitted by the President.

Senator DANFORTH. What required that?

Mr. KRATZKE. An executive order and also in the budget activities. In 1976, the question was raised, but the Commission's position was given the requirement for current submission. All that we could do was to defend what we had submitted to Congress.

Senator DANFORTH. Just a second. After 1976, your position was that you defended what—what you submitted to OMB, or what came out of OMB?

Mr. KRATZKE. We submitted to OMB and the Congress at the same time.

Senator DANFORTH. After 1976, you began defending the budget as you developed it within the ICC?

Mr. KRATZKE. That's correct.

Mr. CLAPP. As a staff member to a former member of the Senate Appropriation Committee, however, I know how easy it is for the proper questions to be asked of agencies to elicit the kind of information they would like in the record—to enable them to make the kinds of points they want to make.

Senator DANFORTH. You knew what?

Mr. CLAPP. As a staff member to a former member of the Senate Appropriation Committee, I know how easy it is for agencies to—although supporting the OMB figure—make their views known.

Senator DANFORTH. I see.

Senator FORD. We have taken 45 minutes and we have 6 more.

Senator Griffin.

Senator GRIFFIN. Let's go on.

Senator FORD. We are not getting into Cabinet level or secretarial positions. This bill extends itself only to the regulatory agencies and that is what we have here today.

I appreciate your testimony, Mr. Clapp, and I appreciate your being here, and I want to compliment you on the tie you have.

Senator DANFORTH. What are the other agencies that have that same provision about submission?

Senator FORD. Amtrak, National Transportation Safety Board, ICC, Consumer Product Safety Commission, Commodities Future Trading Commission.

[The statement follows:]

STATEMENT OF CHARLES L. CLAPP, ACTING CHAIRMAN, INTERSTATE COMMERCE COMMISSION

Mr. Chairman, Members of the Committee: The Commission is pleased to have this opportunity to express its views on S. 263, the "Interim Regulatory Reform Act of 1977." Many provisions of S. 263 directly impact the ICC, and my remarks will be confined to those provisions. S. 263 is the successor bill to S. 3308, which was passed by the Senate in the 94th Congress on May 19, 1976. The two bills are substantially the same.

Section 8 of S. 263 would bring Commission personnel under the protections of 18 U.S.C. 1114, which makes it a Federal offense to kill designated Federal officers and employees while in the performance of their duties. Of equal importance is the cross reference to the above section in 18 U.S.C. 111, which includes all those named in 18 U.S.C. 1114, providing stiff penalties for those convicted of assaulting, resisting, or otherwise impeding the named Federal employees in the performance of their duties. The Commission has repeatedly requested this protection for its employees. We heartily support this provision.

Section 14(a) of S. 263 would amend section 12 of the Interstate Commerce Act to add a new paragraph (8) that would require the Chairman of the ICC to prepare an initial proposal setting forth a recodification of all its "rules" and to submit that recodification to the Congress and to the Administrative Conference of the United States within 360 days of the enactment. The Administrative

Conference would have 120 days to review and comment on the agency's proposals. Ninety days thereafter, the final recodification would be submitted to the Congress by the Chairman. It would take effect 90 days after the date of submission of such final proposal.

Proposed section 12(8)(d) provides that the "duly authorized" Congressional Committees would then take "appropriate action" with respect to each initial and final proposal. It is not clear what constitutes a "duly authorized" Congressional Committee. Presumably, it includes the standing committees with substantive jurisdiction over the laws under which agency regulations are issued. But it could also include select committees, joint committees, and the Committees on Appropriations. It is suggested that the bill be modified to clarify this point.

Proposed section 12(8)(e) requires publication in the Federal Register of each agency initial and final recodification, and provides that written comments must be invited. However, with respect to the final recodification, it would be very difficult for the agency to obtain and give effective review to comments on all its outstanding regulations within 90 days. Therefore, we are faced with the very real possibility that the recodified rules would become effective under proposed section 12(8)(c) even if adverse comments were received and the agency made every attempt to give them due consideration. Lengthening of this time period would provide for meaningful public comments.

We are somewhat concerned about the definition of the term "rule" included in proposed section 12(8)(f). The Interstate Commerce Commission and other regulatory agencies have long used the device of the adversary proceeding, as well as formal rulemakings, to spell out interpretations of the controlling legislation and of our regulations themselves. Thus, many agency decisions are, in effect, statements of general and future effect, and are recognized as such by those subject to and affected by the agency's regulatory authority, even though no formal rules are promulgated. It is our interpretation of proposed section 12(8)(f) that such pronouncements would not be subject to the recodification requirement, but we submit that the bill's language is not completely clear on that point.

A number of our activities result in final actions which would be considered rules under proposed section 12(8)(f). For example, prospective ratemaking which is specifically embraced in the "rule" definition does not produce entries in the Code of Federal Regulations. Rate prescriptions are defined as "rules" in section 551(4) of the Administrative Procedure Act but are actually the product of investigations conducted in an adversary setting and reported in printed decisions of the agency. We believe that the recodification requirements should be limited to rules of general applicability which are regularly codified.

Turning now to consideration of the substance of the proposal, we submit that the very volume of regulatory agency rules presents a formidable picture. The Interstate Commerce Commission's regulations comprise over 1500 pages in the Code of Federal Regulations. We would concede that there are probably items in those regulations that are out of date or almost never invoked. No doubt there are duplications, and there is language that could be clarified. We would like to stress, however, that our rules are not dead letters. They are very much alive, and are constantly in the process of being revised. The Commission's regulations in October 1975, consisted of 145 individual sections. Fifty-nine of these, or over 40 percent, have been the subject of review and amendment since that date. Moreover, the Commission's regulations were completely revised and recodified in 1967, following the creation of the United States Department of Transportation and the consequent transfer to the Department of jurisdiction over matters such as safety and the Standard Time Act. We submit that a complete recodification of our rules is not required at this time.

The Commission recognizes the need for constant vigilance on the part of every governmental body to keep its rules and regulations up-to-date, internally consistent, understandable, and as short and simple as possible. Thus, we fully support what we understand to be the goals of section 14(a) of S. 263. We must question, however, whether a one-year crash program of agency rules recodification is the best way to achieve that goal. Each agency would have to deal with its entire body of rules at one time. Given the volume we fear that little more than a superficial review could be accomplished. The same problem would face the Administrative Conference and members of the public, which

would be called upon to comment on recodified rules from several agencies simultaneously. Even the Congressional Committees— one of which has jurisdiction over all of these agencies—would be hard pressed to do an effective job of reviewing these proposals in 90 days given the limitations on the size of their staff and the demands on the time of their members.

However, if the Committee finds, in its consideration of section 14(a) of the proposed bill, that the agencies are doing an inadequate job in updating and pruning their rules—and we submit that we are, in fact doing an adequate job on a regular basis—we would suggest a somewhat different approach. We think that a better way to tackle recodification would be on a more gradual, but regular, basis. The Congress could require that each agency provide for approval a schedule according to which all rules of a particular category would be reviewed and recodified regularly, with the review of the entire body of agency rules taking place once every 3 to 5 years, depending upon the volume of regulations involved. The schedule submitted by the Agency would become effective within a given time in the absence of Congressional disapproval. In the event of disapproval, a revised schedule would be submitted. Rules not recodified according to the schedule would automatically cease to be effective.

We see several advantages to this kind of approach. It would not impose the very considerable burden upon the agencies, the Administrative Conference, the public, and the Congressional Committees which would result from a one-year recodification effort. It would provide for the regular review of each agency's rules, rather than a one-time review, which might, in many cases, simply devolve into a republication of existing regulations. Most important, it would allow for an in-depth, considered review of agency rules, accompanied by adequate opportunity for digesting and profiting from public views and recommendations.

Subsections 14(b) and (c) extend to all modes of surface transportation the provisions of the Railroad Revitalization and Regulatory Reform Act of 1976 that ensure expeditious initial action on rulemaking petitions and provide for timely delivery of documents from the Commission to the Congress. Both of these provisions were artificially limited to railroads because of the jurisdictional split in the House of Representatives between the Interstate and Foreign Commerce Committee, which has jurisdiction over railroad regulation, and the Public Works and Transportation Committee, which has jurisdiction over regulation of the other modes of surface transportation. Clearly, these provisions should be equally applicable to all modes, and thus we support their extension to these modes.

Subsection 14(c) also modifies the provision dealing with access to information by Congressional Committees by striking the designation of specific Committees and inserting a reference which covers any Committee "which has responsibility for the authorization of appropriations for the Commission." This change makes sense since it ensures that all Committees with substantive jurisdiction over the Commission are covered.

Present law provides that whenever either the House Committee on Interstate and Foreign Commerce or the Senate Committee on Commerce requests the submission of certain documents in the control of the Commission, the Commission must submit those documents within ten days or provide a written explanation as to why they have not been submitted. Subsection 14(c) would provide that only when the documents requested by Congress are not in the possession of the Commission, can the explanatory report be submitted instead of the documents themselves. The exemption for documents obtained from persons subject to regulation by the Commission which contain trade secrets or commercial or financial information of a privileged nature is deleted.

Subsection 14(d) makes changes in the ICC's ability to control litigation affecting the Commission. Section 14(d) recognizes the need to maintain the independence of the Commission in litigation matters by reaffirming the Commission's exclusive authority to commence, defend, and supervise the litigation of actions falling into the listed categories. Section 14(d) plainly has been tailored to the particular facts applicable to the Commission. If a new control of litigation provision is to be adopted, we strongly recommend that subsection 14(d) be retained. This would prevent the anomalous and unhealthy situation of the Executive branch, in the person of the Department of Justice, controlling the enforcement of orders of an independent arm of Congress.

Section 14(f) would amend section 11 of the Act to add that "no person who is appointed to a term as a Commissioner after the date of enactment of this sentence shall, for a period of 2 years following the termination of services as a Commissioner, represent any person before the Commission in a professional capacity." The Commission believes this amendment may not accomplish its aim, and that it may create even greater problems than the one it is designed to remedy. Therefore, we would like first to explore why this amendment would create problems, and then offer some possible alternatives.

The amendment is intended to perform the important function of eliminating conflict of interest situations that might develop in the transition from a Commission position to a post in the private sector. There is no question that representation by a former Commissioner of a party to a proceeding before the Commission of which the ex-Commissioner previously was a member has the potential for conflicts of interest. The possibility exists that the opportunity for post-agency employment could influence an individual during his service with the Government, and there is also the greater possibility that former Commissioners could exert undue influence on those with whom they have had a previous close association. The extent of such influence would vary with individuals and may depend more on the integrity of the Government employee than on any other factor. The quality of the individual in Government is critical.

There currently exists a one-year prohibition against appearances before any court or agency in regard to matters under the "official responsibility" of a former officer or employee of an agency. Subsection 14(f) would impose a two-year prohibition without any qualification as to the matters covered on appearances before the agency. Therefore, subsection 14(f) would tend to reduce, although it may not eliminate, the potential for conflicts of interest, but at the same time, it could substantially worsen the more serious problem of recruiting highly qualified personnel to fill Commissioner positions. Obviously, without highly qualified, competent individuals running the reguatory agencies, these agencies cannot function effectively. And the restraint placed on individuals could paradoxically achieve a result just the opposite from that intended. One of the most important, if not the most important, subjects of the present public discussion over regulatory reform is how to go about getting the most highly qualified people for the highest decisionmaking roles in the independent regulatory agencies.

One step in the right direction has been the recent action to increase Federal Executive pay scales, after many years of artificially low wages. The two-year prohibition, in our opinion, would negate the beneficial effects that the higher pay scales might accomplish in attracting qualified, honest, and capable persons to Government service.

There are several other shortcomings with the Subsection 14(f) provisions. First, it will have the effect of putting the Commission at a substantial disadvantage in that well qualified people will naturally look for positions in agencies not covered by the statutory limitation on future employment. Inevitably, this will result in a reduction in the quality of people appointed as Commissioners.

Second, subsection 14(f) makes no distinction between Commissioners who leave the agency voluntarily in the middle of a term and those who leave involuntarily, at the end of fixed terms or upon a change in Administration. Even the one statutory prohibition that presently exists on this subject, section 4(b) of the Communications Act (47 U.S.C. 154(b)), which the S. 3308 Report indicates is the model for the new provision, provides that its restriction on representation (which only extends for a year) "shall not apply to any Commissioner who has served the full term for which he was appointed." This exception is well-advised since it is particularly unfair to place broad limitations on the future employment of a Commissioner who has served his term and is not leaving the agency voluntarily.

Third, the prohibition is ambiguous. The words "represent any person before the Commission in a professional capacity" are susceptible to varying interpretations. They could be broadly construed to prohibit an ex-Commissioner from providing professional services either as an employee, attorney, or consultant to any person on matters relating to Commission business. On the other hand, these terms could be narrowly construed to mean only that an ex-Commissioner cannot appear formally before the Commission, although he can do all of the

behind-the-scenes work. If this is how this language were to be interpreted, it would apparently not touch the problems posed by informal contacts or communications. The vagueness of the terms could have unfortunate consequences in that they are broad enough to discourage well-qualified individuals from becoming Commissioners, while at the same time they are ambiguous enough to allow conflict of interest situations to fluorish behind a facade of compliance.

The two main conflict of interest problems that arise from post-agency employment of a Commissioner by a party doing business before the Commission are first, the potential that such an employment offer could influence an individual during his service with the Government, and second, the possibility that former Commissioners could exert undue influence on those with whom they have had a previous close association. Both of these possibilities are already addressed either by statute or in the case of this agency at least, by Commission rule. These provisions include 18 U.S.C. 207, which precludes former agency employees or members from acting as agents or attorneys in connection with proceedings in which they participated as an agency employee or member and from appearing personally within one year after their employment ceases. Similarly, Canon 9–101 of the Code of Professional Responsibility of the American Bar Association provides that a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee. Moreover, section 17 of the Commission's Canons of Conduct for Members or Employees (49 C.F.R. 1000.735–17) provides that no Commission member or employee should participate in any matter involving a party with whom he is negotiating for future employment.

Another series of relevant prohibitions are the Commission's rules against ex parte communications (section 18 of the Commission's Canons of Conduct (49 CFR 1000.735–18) and Appendix C of the Commission's General Rules of Practice (49 CFR part 1100. App. C)). These rules prohibit ex parte communications of any kind between Commission personnel and parties involved in on-the-record proceedings, such as ex-Commissioners, on the merits of any proceeding in which the Commission personnel are involved. Similar prohibitions are contained in section 4 of the recently enacted Government in the Sunshine Act, P.L. 94–409.

The fact is that the only way to ensure that cases are decided completely on their merits without any possibility of conflicts of interest is to have intelligent people with a high sense of integrity deciding these cases. Thus, the focus of attenton should be on the present decisionmakers, not on those who have already left the agency. If the decisionmakers are competent and honest, they should have the capacity to sort out and reject any undue influences. Nothing should be done to make it more difficult to get such people into decisionmaking roles.

If, despite what we consider to be persuasive arguments against it, the employment prohibition contained in subsection 14(f) is to be retained, it seems essential for Congress to do something to offset the disincentive that this provision creates. One step might be to establish a system under which ex-Commissioners receive all or part of their Commissioner salaries during the period when their employment opportunities are restricted. This would be in the nature of disability pay in that the statute is preventing an ex-Commissioner from the full exercise of his abilities just as effectively as would a physical disability. There may well be other benefits that would help to balance out the detrimental effect of subsection 14(f) but it is clear that subsection 14(f) standing alone would make it increasingly difficult to maintain the necessary level of quality among regulatory agency members.

In sum, we think that the limitations on employment contained in S. 263 are highly significant and, on balance, a real detriment to the public interest. It is very important that the ramifications of this provision be carefully considered before it is enacted into law. Thus, we urge that other alternatives be examined and substituted for the present subsection 14(f) provision. At a minimum, any such prohibition should be limited to those Commissioners who resign from office prior to the expiration of their terms and should provide authority for some person, such as the Attorney General, to grant a waiver in exceptional circumstances. The conflict of interest problem should be resolved without reducing the quality of regulatory appointees. I feel confident that ultimately a measure can be adopted that accomplishes the objective without attaching the disincentive.

Subsection 14(g) contains an additional amendment to section 11 of the Act, which would limit the instances where the agency could invoke the defense of sovereign immunity in certain tort claim actions. Chapter 171 of Title 28 of the United States Code contains provisions relating to the extent of the liability of the United States for tort claims, and authorizes the Federal agencies to settle claims for money damages against the United States for "injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Section 2680, within that chapter, contains a number of exemptions from these provisions. Among these is subsection 2680(a) which states that the provisions of the chapter shall not apply to any claim based on an act of omission of a Federal employee "exercising due care, in the execution of a statute or regulation whether or not such statute or regulation is valid, or based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the Federal agency or an employee of the government." And, subsection 2680(h) exempts "any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

Subsection 14(g) would add a new subsection 11(2) to the Interstate Commerce Act which would provide that these two exemptions would not bar bringing a civil action on a claim against the United States if the claim is not made with respect to any agency action and if the claim is based on (i) any misrepresentation or deceit on the part of the Commission or any employee or (ii) any performance or failure to perform a discretionary function on the part of the Commission or any employee if the performance or failure to perform is grossly negligent. With respect to claims based on discretionary actions of the Commission, the new subsection would provide that no judgment could be entered against the United States unless the court found that the action taken or omitted was unreasonable.

These new provisions would be put into effect for a trial period ending on January 1, 1979. In the body of its report on S. 3308 the Commerce Committee states that the use of the doctrine of sovereign immunity to shield the Government from legal responsibility for the misfeasance and nonfeasance of its employees has been criticized and curtailed in recent years. The Commission believes that this further curtailment is justified subject to review of the results during the trial period.

Subsection 14(h) of S. 263 would also amend section 11 of the Interstate Commerce Act, and require the President to obtain the advice and consent of the Senate when naming the Chairman of the ICC. Since any new Commissioner is now appointed with the advice and consent of the Senate, this provision would affect only a President's choice of a sitting Commissioner as Chairman (a new Commissioner under this subsection could still be made a Commissioner and Chairman at the same time) by making him undergo Senate scrutiny a second time. This conforms to a current provision to section 11 of the Interstate Commerce Act that allows sitting commissioners to continue to serve until they are reappointed or replaced.

Appointment as Chairman would be for three years, but upon expiration the Chairman would continue to serve as such until reappointed or until his successor is appointed and qualified.

There are several advantages to this proposal. First, setting a definite term for the Chairman guarantees at least some period of continuity of leadership, even if there is a change in Administration. The problem of rapid turnover in leadership of the regulatory agencies has been well-documented. Second, in the case of a sitting Commissioner, it provides an opportunity for the Senate, and thus the public, to scrutinize the candidate's record of service with the agency, prior to his assuming the Chairmanship. Third, the proposal allows the President to retain a Chairman indefinitely after his term has expired, without requalification by the Senate.

There are some drawbacks to this plan, such as the fact that it will be time-consuming and sometimes of dubious value to re-scrutinize a sitting Commissioner for appointment as Chairman. More importantly, a sitting

Chairman, whose 3-year term is to end, or has ended, could lose some degree of independence if he is concerned about reappointment. Of course, the Chairman now serves at the pleasure of the President, anyway. Therefore, on balance, it appears that the advantages outweigh the disadvantages.

Subsection 14(i),[1] would set appropriations ceilings for the Commission not to exceed $59,850,000 for the fiscal year ending September 30, 1978, and $62,700,000 for the fiscal year ending September 30, 1979. The Commission believes these ceilings to be most unfortunate, and to pose the very real possibility that vital programs will not be undertaken, and, that those undertaken or now in existence will be so severely hampered as to be ineffective.

The Commission recently appeared before the Senate Subcommittee on Transportation of the Senate Committee on Appropriations to discuss the ICC's budget request for fiscal year 1978, which is $67,504,000. I would now like to share with this Committee some of the reasons given in support of our budget request.

In formulating our 1978 budget request, we realized the need to improve the quality of regulation while minimizing our budget request. When preparing our estimates, we examined not only the incremental requests, but the underlying projects themselves. In effect, we used a zero base budgeting technique at least with respect to discretionary or other controllable programs. While we would have liked to have submitted a budget requesting no increases, we reluctantly concluded that additional resources would be necessary if we are to achieve our four main goals of 1978: a substantial enhancement of our restructured compliance program, expansion of consumer protection and assistance, reduction of regulatory lag and increased use of economic analysis in the decision making process.

The Compliance Program has two principal objectives: to ensure that the provisions of the Interstate Commerce Act are adhered to, and to provide assistance and protection to the consuming public. Strengthening our Compliance Program enables us to expand and improve our consumer oriented projects Recently, the Compliance Program was reorganized to provide closer coordination of the investigative and prosecutorial functions, which have been combined in a new Bureau of Investigations and Enforcement, most of whose staff will be stationed in the field. The field staff is the primary arm by which the Commission discharges its compliance and consumer assistance functions. The workload is immense. In FY 1976, the field staff processed almost 15,000 applications for operating authority, conducted more than 1,000 enforcement investigations, undertook over 6,000 compliance surveys, and handled over 40,000 complaints concerning motor carriers. The large number of complaints testifies that dependable, fair, and efficient transportation service for all is an end which has not yet been reached. To bring this goal closer, the Commission has established transportation consumer specialists and transportation assistants in key centers. Their efforts have led to a substantial improvement in the handling of household goods complaints.

Our revitalized Compliance Program includes a clear statement of policy (which we did not have before), a restructuring of organization to place more authority in the field, and augmentation of investigative resources to address major transportation issues.

Consumer protection is also provided by our tariff examination program. Our tariff examiners search for hidden charges that would raise the cost of transportation services to the consumer. Tariffs are examined to ensure that they comply with the laws and regulations of the Commission, and to ensure that they are just, reasonable and non-discriminatory. Although we receive over 400,000 tariff publications each year, programmed internal efficiencies have more than offset the growth in the workload and no additional resources are requested for tariff examination.

While the effectiveness of regulation in protecting the consumer is a major priority, the Commission cannot overlook the burdens which regulation places upon those providing the regulated services. Particularly, we are concerned with small businesses which do not have the resources properly to study the regulatory process and develop the necessary understanding for effective opera-

[1] It should be noted that subsection 14(i) would add a new section (3) to the end of section 17 of the Interstate Commerce Act. Section 17 presently contains 15 numbered subsections, and the reference in subsection 14(i) should be corrected to new subsection (16).

tion within the regulatory system. To minimize this burden the Commission has approved a program for increased assistance to small business in the establishment of accounting systems which will not only comply with regulatory requirements, but also provide the basis for a better evaluation of the overall financial stability of the business. We also intend to provide a focal point within each of our six regions and at headquarters for contact by small business and to take an active role in seminars such as those sponsored by Federal Executive Boards and Small Business Administration Regional Offices. This effort would also include receiving inputs regarding potential paperwork reductions.

The Commission is also performing the audit and valuation of the Trans Alaska Pipeline System. As the cost of the oil to consumers will reflect transportation charges, and transportation charges will include a return on the fair value of the pipeline, it is crucial that only legitimate costs be included in the pipeline valuation. Our auditors and valuation experts will ensure that only necessary costs are included in the valuation, so that consumers do not pay for costs resulting from inefficient construction and management. The audit is now beginning and will continue through Fiscal Year 1978. The primary function is being performed by contract.

Consumer protection will also be provided by the Office of Rail Public Counsel, an independent organization affiliated with the Commission. The President has not yet appointed a Rail Public Counsel. Until he does, the Commission will continue using its own people to perform some of the functions we anticipate the Public Counsel will eventually want to undertake. In this connection we are submitting a copy of a recent letter from the Comptroller General with reference to the Commission's continued authority to provide a public counsel function.

For all our programs relating to consumer protection and asssitance, we are requesting approximately sixteen additional positions for each of our existing field regions.

The third main goal that our 1978 budget provides for is the elimination of regulatory lag. The 4R Act of 1976 placed strict time limits on the handling of many types of rail cases. We have structured our procedures to adapt to these time frames. A backlog still exists in the motor carrier operating rights program. Our resource request includes 51 temporary positions to clean up this backlog. If we receive these positions, we expect that at the end of two years we will have both eliminated the backlog and developed procedures which will prevent it from reoccurring. In recent years we have attempted to speed up the decision making process by placing greater emphasis on rule-making proceedings and the use of modified procedure. Nevertheless, I have concluded that the only way we can solve the immediate "regulatory lag" problem in the Formal Proceedings program is with additional resources. Commissioner Christian, however, does not believe the additional 51 positions to be necessary and instead believes that the backlog can be reduced through more efficient utilization of our existing personnel.

The Commission's fourth goal for 1978 is to increase the use of economic analysis in the decision making process. Presently, our Bureaus of Economics and Accounts provide expert information to the Commission, and our 1978 budget request provides for expansion of both these Bureaus.

To assist the Commission in long range policy planning ,a long range planning group has been established within the Rail Services Planning Office. It can advise the Commission of long range effects of various courses of action.

During Ex Parte 271, the Commission's indepth investigation into the railroad's rate of return, railroad funds flow forecasting techniques were developed and effectively used. We believe it would be beneficial if the Commission maintain an ongoing program of funds flow forecasting. The ability to determine in advance the effect of various alternatives will lead to a substantial quickening of the decision making process. We anticipate that this will be an especially useful tool in rail and motor carrier rate cases. Therefore. our budget request includes eight positions for a new Depreciation and Funds Flow Analysis Unit.

That concludes my opening statement, Mr. Chairman. We will be glad to respond to any questions that you and other members of the Committee may have.

ACTING CHAIRMAN CLAPP, DISSENTING IN PART

Although I am opposed to the employment prohibition of subsection 14(f), I do not support the plan proposed by the majority to remedy the problem which this section creates. Ex-Commissioners should not receive disability pay during the 2 year period in which they would be restricted from representing parties before the Commission in a professional capacity.

SEPARATE STATEMENT OF COMMISSIONER CHRISTIAN

While I am in general agreement with the position of the majority, I cannot subscribe to the suggestion that ex-Commissioners receive all or part of their Commissioner salaries during the period when their employment opportunities would be restricted by the proposed amendment to section 11 of the Interstate Commerce Act. Although I view the proposed amendment as unwise and, moreover, as unnecessarily broad and self-defeating, I cannot agree that ex-Commissioners would be otherwise so unemployable and incapable of making a living that it is necessary to make them wards of the state.

If any such prohibition is to be adopted, some effort should be made to find less drastic alternatives than those embodied in the present bill. At a minimum, any prohibitions such as those in the bill should be limited to those Commissioners who resign from office prior to the expiration of their term and should provide authority for some person, such as the Attorney General, to grant a waiver in exceptional circumstances.

MARCH 23, 1977.

Matter of: Interim Authority of ICC Office of Rail Public Counsel.

DIGEST

1. The Office of Rail Public Counsel to be established under authority of a new section 27 of the Interstate Commerce Act as amended by section 304 of the Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, is independent of the Interstate Commerce Commission although affiliated therewith. Consequently the Commission has no authority to appoint an Interim Director or other employees of such statutory Office.

2. The Interstate Commerce Commission, as part of its statutory authority under the Regional Rail Reorganization Act of 1973, 45 U.S.C. § 715, to make sure that the public interest is properly represented in its proceedings, can create an Office of Public Counsel with significant but not complete independence from the Commission. Creation of the Office of Rail Public Counsel under section 304 of Pub. L. No. 94–210 will preempt from the ICC those functions relating to rail matters granted that independent Office, but such Office is not actually established until the first Director is appointed by the President and confirmed by the Senate.

This decision responds to a request from George M. Stafford, Chairman of the Interstate Commerce Commission (ICC), for advice with respect to whether the Commission may appoint an interim director of the newly authorized Office of Rail Public Counsel pending the Presidential appointment and Senate confirmation of the first permanent director under section 304 of the Railroad Revitalization and Regulatory Reform Act of 1976 (Known as the 4R Act), Pub. L. No. 94–210, 90 Stat. 51. Mr. Stafford's request was prompted by a suggestion he received from the Chairman of the Senate Committee on Commerce and the Chairman of the Surface Transportation Subcommittee of the Senate Committee on Commerce that the Commission make such an interim appointment.

"1. Whether, under the terms of the Railroad Revitalization and Regulatory Reform Act or other applicable law, the Commission is empowered to appoint an interim director of the Office of Rail Public Counsel.

"2. If so, what powers may be conferred by the Commission as compared with those powers conferred upon the permanent director under the Railroad Revitalization and Regulatory Reform Act.

"3. Whether an interim director would have power to make future budget requests directly to Congress in the way that the Railroad Revitalization and Regulatory Reform Act appears to confer such power on the permanent director.

"4. Whether it is lawful for the Commission to allocate budget and staffing resources to an interim office of Rail Public Counsel.

"5. In the event that you are of the opinion that the Commission could not appoint an interim director of the Office of Rail Public Counsel, whether the Commission could do indirectly what it could not do directly; that is, whether it could designate employees (or a consultant or contractor) temporarily to carry out functions identical or similar to those assigned by statute to the Office of Rail Public Counsel and fund those functions from its present budget resources."

Question 1. In his letter responding to the suggestions from the Chairmen, Mr. Stafford expressed the Commission's view that the proposed appointment of an interim Director of the Office of Rail Public Counsel is of doubtful legality. He said: "In our discussions we have had very much in mind that Congress intended the Director of the Office of Rail Public Counsel to be appointed by the President with the advice and consent of the Senate. PL 94-210 gives the Director such policy and budgetary autonomy that we, after consultation with our General Counsel, have been forced to conclude that we could not name even an Acting Director without thwarting the apparent will of Congress and the Act. It would also appear that we could not legally use funds allowed under the Act for an Acting Director of our own choosing, nor could we legally divert funds authorized for other Commission functions to such an acting official. It would appear to be legally very doubtful that an Acting Director could use funds appropriated to an office which by law is to be activated by the making of a Presidential appointment. The Acting Director could operate only through the use of Commission personnel detailed to him, thus making the Office primarily a Commission function."

This reasoning is sound. Section 304 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, by amending the Interstate Commerce Act to provide for a redesignated section 27, provides for the establishment of an independent Office of Rail Public Counsel. Section 27(1) describes the Office as "a new independent office affiliated with the Commission * * *." Section 27(2)(a) provides that the Office "* * * shall be administered by a Director ' ' ' appointed by the President, by and with the advice and consent of the Senate." Section 27(2)(b) makes the Director, not the Commission, "responsible for the discharge of the functions and duties of the Office of Rail Public Counsel." The Director also has, under section 27(3), authority to "appoint, fix the compensation, and assign the duties of employees" and to "enter into * * * such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of his functions and duties." Section 27(4) list a series of independent actions the Office may take to participate in Commission proceedings and contest Commission actions.

Section 27 in no way suggests that the Office of Rail Public Counsel is a part of the Interstate Commerce Commission, under its direction or control, or in any way subordinate to it. The only organizational connection between the Office and the ICC suggested in the statute is the word "affiliated" in section 27(1). The ordinary meaning of "affiliated" is that of a loose but formal relationship between persons or group. The word does not necessarily suggest control or dependence. In the context in which the phrase appears, and considering the remaining subsections of section 27, the word "affiliated" cannot be said to give the ICC any independent control or authority over the Office of Rail Public Counsel. Moreover, the Conference Report, H.R. Report No. 94-781, 94th Cong., 2d Sess. 162-164 (1976) clearly indicates the exercise of a conscious choice to take the selection of the Director out of the hands of the Commission. In view of the foregoing, we find that the Interstate Commerce Commission has no power to appoint an interim director of this Office of Rail Public Counsel, nor may it appoint other employees of the Office, such responsibility being placed solely in the Director.

Questions 2. 3. and 4. Our decision with respect to question 1 renders moot questions 2, 3 and 4 of the Chairman's request which are conditional on an affirmative answer to question number 1.

Question 5. The Chairman's question 5 consists of two principal issues; the first is the extent to which the Commission possesses authority to establish an Office of Public Counsel independent of the 4R Act of 1976, and the second is the extent to which section 304 of the 4R Act has preempted any expréss or implied authority of the Commission to perform Public Counsel functions.

AUTHORITY PRIOR TO THE 4R ACT

In October 1975, the Interstate Commerce Commission announced the establishment of the Office of Public Counsel. This Office was developed out of the experience of the Commission in a special Office of Public Counsel which was established to carry out some of the responsibilities of the Rail Services Planning Office pursuant to section 205 of the Regional Rail Reorganization Act of 1973, Pub. L. No. 93-236, January 2, 1974, 87 Stat. 993, 45 U.S.C. § 715(d)(2) (Supp. IV, 1974). In October 1975, the responsibility of the Public Counsel was expanded to cover all matters subject to ICC consideration.

An October 31, 1975, ICC press release described the Office in the following terms:

"The Public Counsel shall be appointed by the Chairman, subject to the approval of a majority of the Commission. He shall be qualified by training and experience in matters of transportation regulaton and be compensated at a GS-18 level of pay in the classified service. He shall be removed only for cause by an absolute majority of the entire Commission membership.

"The Public Counsel shall be subject to the administrative supervision of the Chairman but in all other respects shall not be accountable to the Chairman or the Commission, and shall have the right to make independent budget recommendations to the Office of Management and Budget and the Congress.

"The Public Counsel within the budgetary and personnel allocations and pursuant to such procedural requirements as the Commission shall have established, shall employ or contract for such permanent or temporary personnel and services as may be necessary for the proper discharge of his functions and duties, including the employment of attorneys, engineers, accountants, and economists, as may be required for the preparation, offering, and analysis of testimony and exhibits. In addition, he shall coordinate the activities of the Office of Public Counsel with other Bureaus and Offices of the Commission and may request, and upon approval of the Chairman shall receive the assistance and services of such other Bureaus and Offices, having due regard for their existing workloads.

"The Counsel shall have discretion to participate as a party in proceedings, adjudicative or rulemaking, before the Commission in which he deems his participation may be of assistance to the Commission in determining the public interest, and the Commission, on its own initiative, may direct his participation as a party. The proceedings normally will be, but are not necessarily limited to, those in which issues of national transportation importance are involved, in which hearings are ordered, and/or in which the representatives of the parties are not likely to develop all of the facts or arguments that the Commission should have in rendering its decision. He will in any proceeding be responsible for assisting in the development of the record in the Commission's effort to determine the public interest with regard to the Interstate Commerce Act and related statutes, recognizing that such legislation provides the frame of reference within which the Commission operates, and that the policies expressed therein must be the basic determinants of its action.

"The Public Counsel, as any other party, may intervene in, and may petition for the institution of proceedings before the Commission at such times and in such manner as is appropriate under the Commission's rules, and he shall as a party be afforded all of the rights, and be bound by all of the obligations applicable to other parties and their counsel."

We have held in cases concerning the Federal Trade Commission (FTC), B-139703, 1972, and Nuclear Regulatory Commission (NRC), B-92288, 1976, that each of these regulatory agencies (as well as others discussed therein, including the ICC) possesses authority to pay the expenses of indigent intervenors from its appropriate funds and take certain other administrative actions to facilitate participation in the proceedings by such intervenors when the agency determines that such participation is essential to enable it to carry out its funcions and the assistance provided is necessary to secure the participation of the intervenors in question. We noted some important limitations, however. With respect to the authority to provide a Public Counsel we stated in our decision in the NRC case, B-92288, *supra*:

"Certainly, however, no authority exists for NRC to supply funds for an independent Public Counsel outside of the regulatory agency * * *.

* * * * *

"* * * Although we believe the Commission's authority to administer the Atomic Energy regulatory scheme is sufficient to allow provision of some form of assistance to participants, it does not have authority to use its appropriation to finance independent entities not within the jurisdicion and control of the agency where the purpose of those entities is to assist adversary participants in NRC's proceedings."

The limitations suggested by these comments do not pertain to the ICC Office of Public Counsel that was formed in early 1974 as part of the Rail Services Planning Office to carry out the explicit mandate of section 205 of the Regional Rail Reorganization of 1973, 45 U.S.C. § 715. In expanding the Office of Public Counsel, the ICC's press release of October 31, 1975 (quoted supra) indicates that it was reorganized to give it more independence but nonetheless is still based upon a delegation of authority from the Commission. While substantially insulating the Office from day to day control of the rest of the Commission, the Office as described in the October 31 press release is not "an independent Public Counsel outside the regulatory agency * * * which we cautioned against in our NRC decision. Id. The Public Counsel who heads the Office is assigned the responsibility by the Commission of assisting it "in developing the record in the Commission's effort to determine the public interest." The Commission is to hire the Public Counsel and can remove him for cause. The Counsel is to employ personnel under "budgetary and personnel allocations pursuant to such procedural requirements as the Commission shall have established * * * And despite the statement that the Public Counsel "shall not be accountable to the Chairman or the Commission," the Commission retains authority to reorganize this Office so as to regain any authority it has delegated. Further, the Commission has not, nor could it, relieve itself of its ultimate accountability for an Office that remains within its organizational framework. Compare this form of independence with the independence created by the Office of Rail Public Counsel discussed under Question 1.

Accordingly, we find that the ICC had the authority to create an office such as that described in the October 31, 1975, press release under its general statutory and regulatory authority and that it continues to possess such authority, subject to any preempion resulting from section 304 of the 4R Act.

PREEMPTION

While there is no specific language in section 304 of the 4R Act preempting the authority of the ICC to exercise authority it possessed prior to its passage, there is a clear indication in the way section 304 is written and its legislative history that the Office of Rail Public Counsel was intended to replace that portion of the ICC Office of Public Counsel functions that dealt with matters involving common carriers by railroad, subject to Part I of the Interstate Commerce Act, 49 U.S.C. § 1, *et seq.*

The Senate Committee on Commerce reviewed the development of ICC's present Office of Public Counsel with approval. In its report on S. 2718, the Committee said:

"Another impediment to regulation in the public interest has been the limited opportunity for the development of a public interest record before the Commission. While the provisions of the Interstate Commerce Act require public notice of proposed actions, an opportunity for interested persons to submit their views, and public hearings in some cases, public participation and more importantly the development of a public interest record, has been limited.

"Acknowledging this problem, the Regional Rail Reorganization Act of 1973 gave an even more explicit mandate to the Commission's Rail Services Planning Office created by that Act, to assure that the views of the public were adequately represented in the hearings and evaluations conducted by the Office. Section 205(d)(2) of the Act directed the Office to employ the service of attorneys and other personnel to protect the interests of communities and users of rail service which, for whatever reason, such as their size or location, might not otherwise be adequately represented in the course of the hearings and evaluations conducted under the Act.

"In response to this Congressional mandate, the Director of the Rail Services Planning Office appointed a Public Counsel whose functions is to provide legal representation and assistance to the public throughout the restructuring process set in motion by the Act. The Office conducted hearings on the preliminary

system proposed by the USRA and at each hearing location one or two attorneys from the Office of Public Counsel were assigned to assist the public. These attorneys meet continuously and extensively with the public in the weeks prior to the hearings and during the hearings themselves. The Office of the Public Counsel was independent of the administrative control of the Director in developing for the record any information or view deemed pertinent.

"In its oversight of the regional Rail Reorganization Act, this Committee found the workings of the Office of Public Counsel contributed greatly to the reorganization process by both keeping those who might be affected by the Act informed of the reorganization process and by representing them in the various proceedings called for under the Reorganization Act. This work both increased public confidence in the outcome of the reorganization process and increased the quality of that process by insuring that the voice of all concerned was heard by the planning officials.

"The success of this limited experiment has led the ICC and this Committee to conclude that the public would benefit by the creation of a permanent Office of Public Counsel affiliated with the Commission to help the Commission to develop the record on issues affecting the public interest. The Commission moved in October to create such an Office and this legislation would provide a legislative sanction for this action. Of course if the Congress eventually creates an independent Agency for Consumer Advocacy, the Committee would expect that a specialized Office of Public Counsel concerned solely with surface transportation matters could be integrated into that agency." (Emphasis added.) Report of Senate Committee on Commerce on S. 2718, S. Report No. 94–499, 94th Cong., 1st Sess. 15–16 (November 26, 1977).

As can be seen from this report, Congress was aware of the scope of the ICC delegation to its Office of Public Counsel in October 1975. The version of the bill, S. 2718, that the Committee had before it at that time was described by the Committee as providing legislative sanction for the existing ICC office. *Id.* However, as indicated by the underlined portions of the report, supra, it anticipated a fully independent specialized Office of Public Counsel "eventually" which would replace the existing office.

The House passed version of this Act, H.R. 10979, created a similar Office to the one created by the ICC in October 1975. However, due to a jurisdictional objection by the House Committee on Public Works and Transportation, its proposed Office was restricted to rail matters and was to be called the Office of Rail Public Counsel. The Conference Committee adopted, in most respects, the Senate's proposal for this Office but restricted its jurisdiction to rail matters. Report of the Commitee on Conference on S. 2718, H.R. Report No. 94–781, 94th Cong., 2d Sess. 163–164 (January 23, 1976).

From the above it is our view that while the Congress, for reasons of Committee jurisdiction, dealt only with rail matters, it supports, at least in principle, the more general Office of Public Counsel established by the Commission. Since neither the Act nor its legislative history evidences an intent to limit the Commission's authority to continue its Office of Public Counsel and in view of the general approval given to that Office, it is our opinion that the enactment of section 304 was not in any way intended to affect the Commission's authority to continue those operations of its Office of Public Counsel which were not preempted by and given to the Office of Rail Public Counsel.

We next consider when section 304 of the 4R Act takes effect to limit the operations of the existing Office of Public Counsel. As noted below, the legislative history of section 304 indicates congressional approval of the past efforts of the ICC to develop an office specifically responsible for considering the public interest. It is reasonable to assume that Congress did not intend to affect the Commission's efforts and authority until the Office of Rail Public Counsel actually comes into existence. Despite the language of section 304 which speaks of the Office of Rail Public Counsel as being established within 60 days of enactment of the 4R Act, under the terms of section 304, there can be no functionally existent office until a Director of the Office of Rail Public Counsel is appointed and confirmed in conformance with the new section 27(2) of the Interstate Commerce Act. Accordingly, we find no preemption of ICC authority to establish and carry out the functions of an Office of Public Counsel with respect to rail matters until such time as a duly appointed and confirmed Director of the Office of Rail Public Counsel takes office.

Finally, we note that of the authority granted the Office of Rail Public Counsel under section 304 of the 4R Act, at least the authority to seek judicial review and the authority to evaluate and represent the public interest "before other Federal agencies when their policies and activities significantly affect rail transportation matters subject to the jurisdiction of the Commission" exceed that given the Office of Public Counsel under the internal arrangements of the ICC. See Commission press release, quoted above. These are activities which require specific legislative authorization and would not be sustained as being within ICC's general statutory authority.

We therefore conclude, in answer to question 5, that the ICC retains the authority to establish an Office of Public Council similar to that described in its October 31, 1975, press release and that the jurisdiction of that Office to deal with rail matters will not be affected until the Office of Rail Public Counsel established by section 304 of the 4R Act becomes operational. However, the Commission's authority is not sufficiently extensive to give the Office of Public Counsel the same authority granted the Office of Rail Public Counsel to seek judicial review or appear before other agencies as representatives of the public interest.

R. F. Keller,
Deputy Comptroller General
of the United States.

[The following information was subsequently received for the record:]

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., April 19, 1977

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: Thank you for your letter of April 7, 1977, enclosing certain questions posed by Senator Schmitt pertaining to matters dealt with in the April 4, 1977, hearing before your Committee. Enclosed are the responses to those questions for inclusion in the hearing record.

If I can be of any further assistance, please contact me.

Sincerely yours.

A. DANIEL O'NEAL,
Chairman.

Enclosures.

Question 1. To what extent does your agency have a complete cross-referenced catalog of regulations by subject matter, by requirements and by impact upon consumers, businesses and other agencies of Government? Are they readily available for public use and Congressional reference after they have been promulgated? How do you detect overlapping or inconsistent regulations in your agency and between agencies?

Answer. All regulations of this Commission are codified in the Code of Federal Regulations, (CFR) which is indexed according to subject matter (see 49 C.F.R. Parts 1000–1199, pp 5–8 (1976 ed.)) The Commission's regulations are found at 49 C.F.R. 1000.1 et seq. An explanation of how to use the Code is set forth at page v of 49 CFR. These regulations are not cross-referenced by requirements or by impact upon consumers, businesses, and other agencies of Government. However, the Commission publishes and distributes separate booklets containing comprehensive information concerning regulations impacting upon consumers and businesses. For example, those relating to moving your household goods.

In addition, the Interstate Commerce Act Annotated refers, after each section of the Act, to the Federal Register volume and page upon which is set forth a regulation issued pursuant to that section. This, any party interested in finding a certain regulation could either refer to the index of the CFR, or to the relevant section of the ICA Annotated. Both the Code of Federal Regulations and the Interstate Commerce Act Annotated are readily available for public use and Congressional reference.

Although the Commission does not conduct a formal review of its regulations to determine overlaps or inconsistencies therein, we believe that the proce-

dures utilized prior to issuance of a regulation ensure very little overlap or inconsistency. The Commission's regulations with few exceptions are promulgated only after comments by interested parties. These parties, which generally represent interests on all sides of an issue, and frequently include other agencies, direct their comments to any significant overlaps and inconsistencies with other regulations. Moreover, the Commission's own staff and decisions review is designed in part to avoid this problem.

Pursuant to P.L. 94–210, Section 312, the Commission is engaged in an extensive review of the Interstate Commerce Act and all Acts supplementary thereto, looking to their modernization, revision, and codification. We are required by February 5, 1978, to submit a final draft designed to simplify the present law and to harmonize regulation among the various modes of transportation subject to our regulation. This review should be helpful in detecting overlapping and inconsistent laws and regulations.

Finally, the Commission maintains an ongoing review of its existing regulations as a part of its successful paperwork burden reduction program. A copy of a recent review of that program is attached.

Question 2. To what extent are you required to include economic impact statements with proposed regulations? How do you determine whether the benefits will exceed anticipated cost to consumers?

Answer. The Commission is not specifically required under present law to include economic impact statements with proposed regulations or to conduct similar studies in connection with cases, rulemaking, or other like proceedings.

However, the substance behind the cost/benefit analysis concept is already performed under our existing procedures. In effect, the administrative process invites proponents and opponents to bring forward all pertinent data which address the basic concern of interest in the proceeding. In this way, the costs and benefits of the basic questions generally are addressed, can be and are analyzed by the decision maker. The fundamental problems, however, always inherent in cost/benefit analysis is that all pertinent definable benefits or costs are not necessarily easily quantifiable. "Assertions of unquantified concern" substituting for quantitative cost or benefit measurements, while difficult to weigh, may, in fact, provide the most pertinent evidence relative to a particular issue. The use of a strictly structured cost/ benefit analysis technique, when qualitative measurement is the only practical measurement, could do injustice to the development of broad based, sound, and otherwise determinative evidence.

While a formalized cost/benefit analysis program is not incorporated in either the rulemaking or case process, the essence of the present rulemaking and evidentiary procedures required by the Commission appears to address essentially the subject and provide suitable evidence for decision makers to evaluate the costs and the benefits of a specific decision which may be rendered and to do so with reasonable dispatch.

Question 3. To what extent do you measure paperwork impact of regulations?

Answer. The Commission, when determining whether it should adopt regulations which would necessitate extensive additional paperwork by regulated carriers, considers paperwork burden wherever that could result in light of the benefits to be derived from the regulations. Interested parties frequently oppose particular proposed regulations on the basis of increased paperwork, and the Commission itself may be divided as to the appropriate resolution of this issue. For example, a dissent was filed from the recent majority opinion in Ex Parte 285,[1] partially because of one Commissioner's view that the rules adopted in that proceeding would unduly burden rail carriers.

In the case of new or revised reporting requirements, these are usually developed with information concerning industry burdens analyzed early in the design stage and long before notice is published in the "Federal Register." The paperwork impact of reporting requirements is considered: 1) in the design state; 2) in the decisional stage following public response; 3) again in the GAO clearance stage in compliance with the Federal Reports Act, and 4) as a part of our ongoing review of adopted regulations.

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[1] Maintenance of Records Pertaining to Demurrage, Detention, and Other Related Accessorial Charges by Rail Common Carries of Property, 352 ICC 739 (served October 1, 1976)

The burden on the regulated industry is usually analyzed in terms of adequacy of source records, record-keeping changes required, compilation time, and annual man-hours for each company to comply. With respect to existing regulations, our experience concerning the usefulness of the information developed is analyzed in the same terms.

Question 4. To what extent do you determine the effect regulations will have on the courts' workload? Chief Justice Berger recently recommended "judicial impact" statements with new laws. What do you think?

Answer. The Commission does not specifically consider the impact of its regulations on the courts. Of course, all Commission decisions are reviewable in the courts, and the Commission also resorts to the courts for enforcement of its regulations where they cannot be enforced through voluntary compliance efforts or civil forfeiture claims settlement.

Our mandate as we see it is to implement the laws which we administer as effectively as possible, and this means that in many cases that our decisions will be challenged in court. In fact, the most essential regulations and decisions will frequently be the most controversial. A good recent example is the Commission's recent action in Ex Parte No. 37 (Sub–26), Commercial Zones and Terminal Areas (served December 30, 1976). The regulations promulgated in this proceeding significantly expanded the areas of nonregulation in metropolitan areas, and, while deemed by the Commission to be essential to the public interest, were strongly opposed by some interests. Consequently, a challenge to the new regulations is now pending on judicial review in the U.S. Court of Appeals for the Ninth Circuit. To require the Commission to assess the impact of its regulations on the courts could have, in such a case as this, hindered the promulgation of necessary regulations.

The concept of a "judicial impact statement," however, has some merit in the regulatory and legislative process. Quite clearly many new laws have a substantial impact on the courts' workload, and laws affecting this Commission are no exception. For example, Public Law 94–210, the Railroad Revitalization and Regulatory Reform Act of 1976, required the Commission to issue numerous new regulations, all of which are subject to judicial review and several of which are in court right now. In commenting on proposed legislation, the Commission will, as it has done in the past, make an effort to assist the Congress by focussing on issues of judicial workload which particular bills may present. Additionally, the Commission has and will continue to point out to the Congress areas involving the enforcement of regulations where civil settlements could be sought and obtained as an alternative to Court prosecution in order to minimize impact on the courts' workload.

Question 5. Are you preparing to conduct zero-based budget reviews of your programs?

Answer. Yes, and draft instructions and forms were issued to Commission Bureau and Office Heads on April 11, 1977 for their review and comment as to needed clarification, modification, etc. Final instructions are expected to be issued in late April and the Commission's 1979 budget will be developed with adherence to the zero-base concept.

Question 6. What is your view of the "sunset" legislation calling for a phased 5-year schedule of review of federal program functions? Do you favor a "sunset" for agency rules and regulations?

Answer. The Commission believes that continuous and vigorous Congressional oversight is needed to weed out unnecessary or outdated federal programs. To the extent that the various "sunset" legislative proposals such as S. 2, the "Sunset Act of 1977," and S. 600 the "Regulatory Reform Act of 1977" are designed to accomplish these goals, the Commission believes the intent of such legislation to be very desirable. The Commission is currently preparing detailed comments on S. 2 and S. 600 which are to be transmitted to the appropriate Senate Committees in the near future. To the extent that sunset proposals embrace the concept of zero-based budgeting, the Commission favors them. The Commission has not yet completed formulation of its position with reference to current sunset proposals. Last year it expressed its opposition to the particular 5-year phased sunset proposals contained in S. 2812, on May 25, 1976. A copy of the Commission's letter on S. 2812 is attached. We will forward a copy of our comments on the substantially changed current bills as soon as our analysis is complete.

Question 7. There have been several bills and amendments to bills providing for a form of Congressional veto over proposed agency regulations. The budget reform law prescribes Congressional action in the form of decisions and deferrals of proposed impoundments. Please comment on the idea of applying the budgetary process to your agency's proposed regulations, that is, submitting major rules and regulations (i.e. regulations having a substantial impact on consumers and businesses as opposed to minor regulations relating to internal agency matters and with little or no impact on outsiders) to the Congress for review before they go into effect.

Answer. We oppose the enactment of Congressional veto legislation because it imposes an undue burden on the public, the Congress, and the administrative agencies. We believe that it is vitally important for Congress to ensure that the agencies are following the letter and spirit of the statutory mandates given them by Congress, but we do not believe that the best way for Congress to ensure this result is to review every major substantive rule of these agencies.

Such a review would have positive aspects. Certainly some poorly conceived rule or regulation could be quickly eliminated by Congressional review. At times, this could even obviate a lengthy court challenge. However, the liabilities of the proposal seem to us to far outweigh any potential contribution it could make.

The never-ending task imposed on Congress by such legislation would seem to render the proposal unfeasible. Congressional committees would be inundated by review of the rules of agencies under their jurisdiction. The likely results would be that Congressional attention would be diverted from the consideration of legislation on major national issues to the resolution of individual examinations of relatively more insignificant agency regulations.

In order to review agency rules and regulations in the detail required each Committee and individual Member of Congress would probably desire substantially more staff capacity both to analyze the agency rules and to formulate courses of action concerning these rules. Thus, something akin to a bureaucracy could develop. We doubt that this additional review of agency rules is warranted.

One of the most serious adverse effects that this new process would have on Congress would be that it could become a substitute for necesary Congressional oversight of the overall activities of the agencies. Debate about the merits of individual rules could well replace the more important Congressional function of overseeing the overall effort and results of an agency's attempts to comply with its statutory mandate to protect or further the public interest.

This agency, like others, is created by Congress with a statutory mandate to protect the public interest in a certain substantive area. Through the development of expertise and familiarity with the subject matter, the agency is charged with taking the specific action needed to meet the general statutory mandate. If, as contemplated, each major rule that the agency promulgates is to be subject to Congressional review before implementation, the purposes of delegating decision-making authority to the agencies is thwarted.

In order to ensure that the statutory objective of the agency is accomplished, it is vital that Congress carefully oversee the general course of agency action, rather than trying to focus on its particular rules. During the past several years, the goals of economic regulation of surface transportation has received extensive Congressional scrutiny. This has led to the passage of a major new statute, the Railroad Revitalization and Regulatory Reform Act of 1976, P.L. 94–210, which substantially redirects economic regulation of railroads. This oversight together with oversight of agency action also helps us to know how Congress views the general trend in our regulatory activities. Moreover, such review does to the extent necessary seem to focus on particular regulations and to do so without creating an additional forum for argument concerning their promulgation or an additional "bureaucracy" for considering them.

We have welcomed Congressional oversight activities because they provide an effective means of guiding the agency and of developing initiatives needed for long-range legislative improvements. The substitution of a case-by-case adjudication by Congress of agency rules for more broadly based oversight or even the duplication of such oversight could make it considerably more difficult for Congress to develop a full understanding of the needs of the public and to write comprehensive legislation imposing new mandates on the agencies to meet those needs.

We should emphasize that we are not seeking to isolate agency proceedings from Congressional scrutiny. On the contrary, we remain as in the past completely willing to accept comments from Members of Congress or Congressional Committees on rulemaking proposals before us. Moreover, we expect to be held answerable with respect to even minor regulations to the full extent that Congress sees a need for Congressional scrutiny. Indeed we sense that as implicit in the oversight policies now followed by the Congress and its Committees.

Congressional review of major rules and regulations before they go into effect could greatly impede the efforts of administrative agencies to perform efficiently. One of the most persistent complaints about the administrative process is that it takes too long. It is frequently charged that there is an inordinate amount of "regulatory lag." Unquestionably the problem of "regulatory lag" in the implementation of agency rules would be aggravated by the review procedures envisioned in most Congressional veto legislation.

Rules promulgated by this agency are carefully considered after full opportunity for the public to present evidentiary material. After an initial decision is made by the Commission, there usually is another opportunity for all interested persons to be heard. This is often followed by a complete reconsideration of that decision by the Commission. The rules are then subject to judicial review in the Federal Courts of Appeals where they generally receive careful scrutiny. A Congressional veto procedure would add an additional forum at which interested persons would again have to argue their position and yet would not obviate the need for judicial review, if challenged.

Given the extensive review already available to the public, a further review and the attendant delay of what could be several months does not appear warranted. In fact, such statutorily imposed delays work at cross purposes with recent Congressional action imposing time deadlines on all phases of rail proceedings before the Commission. Time saved by these provisions of the 4R Act could be quickly lost through the requirements of Congressional review.

Another trend that could be inhibited by Congressional veto legislation is the increased reliance of the Commission and other agencies on rulemaking proceedings to develop industry-wide standards. In recent years, the Commission has found that formal rulemaking is often the most efficient and fairest means of developing across-the-board standards on a number of matters within its jurisdiction. But should interminable delays become characteristic of a Congressional review process, the development of agency standards on an *ad hoc* basis through adjudicatory decisions, though less satisfactory in many respects, could grow in importance to meet the immediate needs of particular problems.

At present the Commission's procedures are designed to weigh the positions of all parties and to give each the fullest opportunity to be heard consistent with the statutory requirements under which a proposed rule or reguation is considered. This is true whether the interested person is a consumer, occasional shipper or traveler, a large user of transportation services, a segment of the transportation industry itself, a community, or another governmental agency. A likely adverse effect of the veto process in our view would be the additional expense and other burdens that would fall on all of those interested, especially those least likely to be able to sustain such burdens through another round of controversy.

Senator FORD. We have Gerald Norton, Acting General Counsel, Federal Trade Commission. If you will file your statement for the record, it will be printed in total, and I ask if you would brief us, if you please.

STATEMENT OF GERALD P. NORTON, ACTING GENERAL COUNSEL, FEDERAL TRADE COMMISSION

Mr. NORTON. I am testifying at the request of Chairman Collier who is out of the city.

We have discussed the provisions of the bill in detail in our statement. I would like to limit my oral comments to certain features

that we think may require further consideration by the committee. While focusing on the provisions that relate to the Federal Trade Commission, I would like to begin with a general observation about the bill that relates to our criticism of some of the particular provisions concerning its impact on the Commission's ability to allocate its limited resources in the manner it deems most appropriate in carrying out its mission with the highest possible ratio of benefits to costs.

The bill contains seven or eight categories of procedural or institutional amendments which it apply to seven independent agencies having a variety of policy mandates and ways of doing things. Each of the proposals may sound like a good idea in the abstract. We do not take issue with the purpose behind any of them. Some are untried and some reflect procedures already undertaken by some of the Commissions.

Some of the problems addressed in the bill, in addition, may be more important with some agencies than with others, and, indeed, may be virtually nonexistent with others. Some of the problems may be more important with respect to agencies and departments not covered by the bill than they are with respect to those that are. We think a demonstration of the need for these amendments is important because most of the changes will inevitably require substantial commitments of resources by the agencies and those parties affected by their activities.

Before such burdens are imposed, creating new demands on pressed budgets, we should be sure that the changes meet a very real need rather than merely implementing a theoretically good idea. Many of the practical problems with the bill have been addressed in the detailed statements of the Commission and of the other agencies. Based upon a quick review of the other agency statements this morning, we would appropriate amendments if the bill is to go forward.

I will try to focus on some of the points that have not been stressed by other agencies.

Section 3(a) requires recodification of the Commission rules through public comment in two phases. The Commission agrees that agency rules should be reviewed periodically in order to insure that their continued existence is justified. The Commission already engages in such a process. In the past couple of years it has reviewed and rescinded a large number of trade practice rules adopted over a long period of time going back to the 1920s. It is continuing that process.

In addition, the Commission has, until recently, not engaged in substantive rulemaking the way many agencies have because of a perceived lack of statutory authority for a long time. At present, we are engaged in a substantial rulemaking undertaking for the adoption of new rules under the Magnuson-Moss Act of 1975.

One concern we have about the proposal of the bill is that if adopted it might have the effect, on the one hand, of delaying the effectiveness of the Magnuson-Moss rules if they are not adopted before the statutory period or, on the other hand, requiring the Commission to redo that rulemaking process which it has recently completed.

We are concerned about the failure of the bill to distinguish between substantive rules and procedural rules. The procedural rules were not subject to notice and comment procedures before because the provisions of the APA do not require that. We do that now, however, sometimes in our discretion. We question whether we should subject all rules without regard to their type to this type of process, however.

We are not aware of any particular need to depart from the settled principles in the APA on a selected basis. While we agree with the general purpose of this provision, we suggest the burden it might impose on the agency and those affected by the Commission's rules would outwelgh the benefits to be derived from it. This imbalance between cost and benefit would be worsened if the law revision proposal, which I will discuss next, is adopted simultaneously. Not only would that require an additional substantial undertaking by the Commission, but it would involve many of the same people to work on the proposed revisions of the law.

In addition, if that process of law revision resulted in significant changes in the existing laws, then that might make much of the rulemaking either superfluous or it may be necessary to go through it all over again. If the law revision proposal is to be adopted, it may be desirable to defer the rule codification proposal set forth in the bill until there is a clean statute to work with.

Turning to section 4(a), which would require the Commission to review all of the laws relating to it and recommend such revision and codification as may be necessary to improve the administration of its antitrust and consumer protection responsibilities, in conjunction with a rigid format and time period set forth in the bill, the Commission already has the statutory authority to make recommendations to Congress concerning its laws and has done so directly. In fact, in the past 4 years the Commission's statutes have been significantly amended on several different occasions, and there is right now actively pending in the House a bill, Federal Trade Commission Amendments of 1977, which is similar to a bill which passed the Senate last year, S. 642, which would provide a number of updating and significant amendments to the Commission's act.

We think that the formalized procedures set forth in this bill are unnecessary with respect to the Commission, and would impose an unnecessary commitment of resources, particularly if, as I say, it goes forward simultaneously with the rule codification.

Section 5(a) concerning the petitions to institute rulemaking procedures is another of our concerns. The Commission has a variety of options it can consider when it is presented with an allegation or evidence there may be an unfair or deceptive act practice or an unfair method of competition. It can issue a complaint and engage in individual case-by-case adjudication, which it often does, or it can institute a rulemaking proceeding and adopt rules that follow industry lines or that deal with particular practices in all fields, or it can submit recommendations for legislation to Congress and engage in one of its traditional functions. Indeed, it originally was to engage in an information-gathering and publicity function. This

is a varied array of possibilities which involve different commitments of Commission resources depending on the nature of the problem and what seems best suited to deal with it.

The Commission engages in this selective judgment whenever questions are presented to it that may require Commission action. We are concerned about this rulemaking petition proposal in part because it would give the courts authority to second guess the Commission's judgments about how best to allocate its resources in dealing with a particular problem.

The Commission might have concluded, for example, that it was preferable and engage in case-by-case adjudication rather than rulemaking in response to a particular petition that had been presented. Yet this would permit the courts to second guess that and say that isn't the best way to do it, we think you should do it this way.

Rulemaking proceedings at the Commission, in view of the unique provisions of the Magnuson-Moss Act, are substantial undertakings. The act goes beyond the notice and comment procedures of the Administrative Procedure Act and imposes a variety of procedural provisions which mean that when you set in motion a rulemaking proceeding you're imposing not only on the Commission and staff, but on all affected by the rule, a substantial commitment of resources because of the need to comment and participate, cross-examine, present witnesses and the like in these proceedings.

As a result, the proceedings have become much more time consuming and cumbersome than I think was anticipated. When any question is presented about whether the Commission should institute one of these rulemaking proceedings, it gets careful consideration. If we go that way, it means a substantial commitment of resources. It may or may not be feasible in every case to give an up or down, yes or no answer to a petition in 120 days. In most cases that has been possible. But there are some where the nature of the problem is such that you want to take another approach.

Rather than say we'll grant or deny the rulemaking petition we may want to put it on the public record and invite comment so that the decision about whether to institute a rulemaking proceeding can be well informed with knowledge of the real issues and problems to be encountered. The bill would not permit the Commission this flexibility. It would require us to say yes or no within 120 days and if we didn't act, then the person could go to court and get the court to force us even if that is not the best way to proceed. The bill does not require that the court find that to institute a rulemaking proceeding would be in the public interest. That is a standard which incorporates not only resource allocation concerns, but overall judgments about the prevalence of the practice, whether, it is necessary to deal with it at the Federal level, whether, for example, it might be sufficient to refer the matter to State and local enforcement authorities, whether private litigation is sufficient to deal with the problem; for many kinds of problems there are sufficient incentives for private litigation. The statute requires the Commission to consider such matters, but the bill would not require the courts to do so.

Finally on this point, we are not aware of evidence that the Commission practices currently for dealing with these petitions justifies this statutory format.

Section 6(a) provides that Congressional committee requests for documents shall be granted within 10 days and that any time the Commission has documents in its possession that it is going to transfer it to some other person or agency, it must exact a guarantee that those documents will be returned so that the Commission can reply to a congressional request for information.

We think in the main that this provision is unecessary because it has been the Commission's view of its responsibilities that it is obliged to respond to official congressional requests for information and it has done so in a timely fashion.

On the other hand, we think the bill has significant practical problems which may affect the FTC more than they affect other agencies because of our law enforcement activities. We frequently have to get large volumes of documents from companies under investigation. Our task is made immeasurably easier if they comply voluntarily and we are not required to go to court. Whether a company will produce documents on a voluntary basis will be determined by what the consequences will be. Under this bill, one consequence might be that if the company produces documents to us and we turn them back, they would then be under obligation to retain them indefinitely even though they may have no use for them, and to return them in the unlikely event that there would be a congressional request for access to those documents.

We think this kind of provision will make companies much less inclined to cooperate with our information demands and to insist upon court enforcement. That inevitably slows up our investigations and make it more difficult to get on with the work of investigating possible violations.

The bill has a requirement that we respond and submit documents within 10 days, without provisions for extension or amelioration. Frequently that is possible. Often, however, we are dealing with vast quantities of documents which may not all be located here in Washington. Usually we can work out satisfactory arrangements with the committee staff so that we can produce documents in sequence or the staff will come to our offices and examine them. This kind of flexibility is not permitted under the bill and we suggest that the language be changed to accomplish that.

Section 9(a) provides that no one appointed as a Commissioner after enactment shall represent anyone before the Commission 2 years after his or her service on the Commission is terminated.

The Commission is engaged in a comprehensive study of the conflict problem and looking for possible revisions in the Commission's own rules on this subject. It has not taken any definite position on the variety of options that would be presented to it. They may go beyond the provisions of the bill and they may differ in significant respects.

We think it is a question that deserves careful study. There is a need to accommodate, on the one hand, the avoidance of any actual or perceived conflict of interest and, on the other, unduly creating de-

terrence to the recruitment of highly qualified people for top positions.

There are a number of questions that the present proposal raises. We don't pretend necessarily to have the answers to them. One is whether the bill should limit itself to the seven agencies that are under consideration. The problem is governmentwide. It may vary in some respects from agency to agency, but it is certainly not limited to the seven.

Another is whether the provision or any amendment should be limited to the Commission members or any particular type of positions. Again, the exposure to information, the possibilities for ending up in a position of actual or apparent conflict, are not limited to the Commission members, but apply to staff members as well.

It may be that rather than a flat ban for a period of time, which obviously has the advantage of being certain, there may be certain categories that are subject to exception, rulemaking versus adjudication perhaps. It may be desirable to have some kind of clearance or exemption procedure such as the Commission has.

I notice that a number of these questions were explored recently by the Committee on Government Operations.

Section 10(a) would amend the Federal Tort Claims Act to permit suits against the United States based on deceit or gross negligence in the performance of regulatory functions. We are not aware of any particular problems concerning the Commission's activities that might give rise to a need for this and therefore we are not in a position to comment on whether this is the best way to do it.

Senator FORD. Mr. Norton, I believe you could have read your whole statement in a little over 20 minutes. I asked you to brief it.

Mr. NORTON. This is my next to last sentence.

On that we suggest the Justice Department views would be of interest to the committee.

Finally on section 11(a), concerning the appointment and tenure of chairmen, we don't have any serious opposition to the proposal although we think the present system under which the President selects the Chairman of the Federal Trade Commission is satisfactory.

I would be happy to answer any questions.

Senator FORD. I'm somewhat surprised to see your opposition to the law revision provisions in this bill. And while we are aware that the Commission has sent up legislative proposals from time to time, don't you think it would be wise for the Commission and the Congress to take a comprehensive look at the authorities which the FTC administers. For instance, you have wool, fur, textile acts, the Fair Packaging and Labeling Act, the FTC Act and a host of others, some with differing administrative procedures, others which relate to the FTC Act. Then you have the FTC Act itself.

Let me quote you some of those things from the Act itself.

Each Commissioner shall receive a salary of $10,000 a year. Any allotment made to the [Bureau of Corporations] by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the Fiscal Year 1915 shall become funds and appropriations available to be extended by the Commission.

Don't you think these provisions of the law should be revised?

Mr. NORTON. If we had unlimited time and funds it would be desirable to go through every statute and clean it up. What we have tried to do and we think we are doing is focusing on the problems that present the most pressing needs for legislative clarification. As for the provision about the salary of Commissioners being $10,000, I suspect that the gentleman behind you who is likely to become the next commissioner, Mr. Pertschuk, is well aware of the true salary. I don't think anyone is misled by that provision.

Senator FORD. It is part of the act, isn't it?

Mr. NORTON. Yes.

Senator FORD. Don't you think it should be changed?

Mr. NORTON. There may be many parts of the act like that which should be changed. We don't disagree with the possibility that there are ways to improve the language of the FTC Act. What we are concerned about is the way in which the bill poses a comprehensive approach to it and the time periods involved and they might be more than is necessary by any current felt problems under the existing act and would impose a substantial commitment of resources that might usefully be devoted to other matters.

We have no fundamental opposition to this law revision provision, however.

Senator FORD. What is your opposition if it isn't fundamental?

We are trying to get to fundamental operations. The President says, write the regulation in English so you can understand them, read them before you print them. What is your objection?

Mr. NORTON. Our objection is, given the range of things that we have presently to do under our statute and given the limited budget, we don't think that this particular provision presents the most pressing need for Commission activity.

However, it is not an opposition to the idea or principle of law revision. We engage in that. We think we do it in an ongoing way. When problems arise under the existing statute that require legislative attention we address them. That has happened in 1973, 1975, and it is going on right now.

Senator FORD. Does the language appearing on page 34, line 15 of the proposed legislation, "fails to act thereon," with respect to the 120-day provision, doesn't that give you the latitude necessary to accomplish your objective, putting a petition up for comment, rather than proposing a rulemaking.

Mr. NORTON. Not necessarily. There are other factors that may bear on this. The Commission may have an adjudicative proceeding pending on a particular matter and may wish to see what the outcome is before initiating rulemaking. The completion of that adjudication in a 120-day period may be infeasible.

Senator FORD. On congressional access to information, what do you do now if the court permits you access to information and then a congressional committee requests the information, particularly in the case in which the court has placed some limitation on your handling of the information?

Mr. NORTON. We comply with the court order. We have tried, in every case where such an order has been sought, to resist. Generally, we have been sucessful. On one or two occasions we have been unsucessful and in those cases we have complied with the court order. Generally, the committees have been willing to accept that position—recognizing that it is a temporary problem and we can't control the court.

Senator FORD. Senator Griffin.

Senator GRIFFIN. Would trade secret information be a problem under the way this bill is drafted?

Mr. NORTON. Under the request for information section?

Senator GRIFFIN. Yes.

Mr. NORTON. A legal problem, no, because the trade secret exception to section 6(f) of the Federal Trade Commission Act applies only to the making public of information by the Commission and in the *Ashland Oil* case the court agreed with our interpretation that when we transmit trade secret information to Congress that is not a making public within the meaning of Section 6(f) because it can't be assumed in all cases that the information will be made public by Congress.

Senator GRIFFIN. That goes back to the point you made before about how much cooperation you will get from companies you are investigating.

Mr. NORTON. A legal problem, no. A practical problem, yes, because we are now facing repeatedly companies who say:

We will comply with your subpena across the board with one exception. We are concerned that Congress is going to request access to this information and you will say you have to comply with such a request.

We want to get a court order that blocks that.

This is the focus then of a number of recent lawsuits.

Senator GRIFFIN. Have you tried to make any estimate as to what the impact would be on your agency budget and staffing requirements, if this legislation were enacted and you had to comply with it?

Mr. NORTON. We don't have figures on that. We could try to make estimates I suppose but it is hard to say how reliable they would be.

Senator GRIFFIN. Would it be reasonable to say that the general thrust of your testimony is that instead of having broad legislation that applies across the board, that we ought to be looking at each agency to see how its basic statutes should be revised?

Mr. NORTON. That is a fair conclusion. While there are similar problems that affect all agencies, not just those covered by this bill, but all agencies and departments of the Government, they vary, often considerably, from agency to agency as to how important they are and what might be the best solution. And that has to be judged, I think, or can best be judged on a case-by-case basis.

Senator GRIFFIN. Perhaps even what kind of job they have done in the past.

I think Congress might well conclude that some had done a pretty good job. Indeed some may have done an excellent job in the very areas we are trying to regulate, whereas others haven't.

Mr. NORTON. Well——

Senator GRIFFIN. That was not for you to comment on.

Senator SCHMITT. I will submit a list of questions for the record to each of the witnesses this morning so that we can get a systematic set of answers back. I do wish to hear briefly your comments on a question I asked before and that is, do you feel that the citizens out there, writing to you, asking for information on all regulations administered by the Commission that deal with a specific subject, will they get an answer that is comprehensible? First of all, would they get an answer and second, would they get an answer which is comprehensive and comprehensible?

Mr. NORTON. They will get an answer and I think it will be comprehensible. In that particular area, however, the commission is not extensively engaged in energy regulation. Depending on how you define the subject, there would be a variety of different regulations that could bear on it. I shouldn't say regulations. The commission's regulations, in the sense of laying down a binding rule of law, are limited in number. I don't think that any of them relate specifically to energy. But our regulations are indexed, not as they appear in the Code of Federal Regulations but as the Commission makes them available. I think a satisfactory response could be obtained.

Senator FORD. Senator Danforth.

Senator DANFORTH. Mr. Norton, a lot of people are complaining about regulation right now being pushed around by bureaucrats. This makes for great political stump speeches. Everybody gets riled up about it. Obviously this bill is an effort to get some kind of grip on it, some way of simplifying things. Your view is that it is something of a gimmick; is that a fair statement?

Mr. NORTON. No, I don't think that is a fair statement. I wouldn't agree with that characterization. I think it is well-intentioned and there may be a reason to pursue each of these proposals with respect to some or all of the agencies. Indeed some of the agencies have supported all of it. What we are suggesting is that as with any good idea it may be good in some circumstances and less good in others. You may have to tailor it from agency to agency. This is obviously the starting place to do it across the board and see how it looks. What we are suggesting is that it is like a ready-to-wear suit. It doesn't look as good as a tailor-made suit.

Senator DANFORTH. Suppose you were addressing yourself to the problem of regulation. What would you do?

Mr. NORTON. The chairman has indicated that my time is limited. It is a large subject that requires many answers. I don't know that there is going to be a sequence of best answers that apply across the board. You have to focus on particular problems that have given rise to legislation, the very legislation that is the work of these agencies and look to see whether those problems still merit the kind of regulatory approach that was adopted, and then work in that context. It has to be more selective if it is going to be effective both in simplifying the government, limiting unnecessary regulation and still serving the public interest by providing that which was deemed necessary and is still necessary.

Senator DANFORTH. How would you go about that if you were in our shoes?

Mr. NORTON Well, I think the best way is the hard way of conducting intensive investigation of particular agencies, or particular subjects where they cut across the work of many agencies, and seeing what you have already done and seeing whether that still makes sense and then proceeding from there.

Senator DANFORTH. So you state a problem that government is trying to address itself to. You inventory the various approaches that government is taking to that problem and you try to make a determination as to what is working and what isn't working and then you begin to tailor your responses in various agencies to the problems as you define them today.

Mr. NORTON. I would think so. Often the legislative response to a particular problem may reflect political realities that existed at the time the statute was enacted. Without going into particulars, that is a common fact of life. Those realities may no longer hold. The compromise that might have been necessary or thought expedient in the 1930's might be neither necessary no rexpedient today. This is the kind of reappraisal that may be the best approach.

Senator DANFORTH. Can it be done on a systematic basis in your opinion or do we chase each issue that comes along?

Mr. NORTON. I suppose it could be done on an agency by agency approach.

Senator DANFORTH. That would be the sunset type of approach.

Mr. NORTON. Take one agency and look at its activities and move on to the next. That runs into problems too because you have a number of problems where there is overlapping responsibility. Energy, to take your example, is the subject of regulatory action by a number of agencies or departments or offices and that may be an area where you have to take more of a functional or subject matter approach rather than looking at it through an agency by agency approach.

Agencies have various mandates in terms of specificity. The Trade Commission, for example, covers the whole range of corporate activity in business, methods of competition, without a particular substantive focus. It is not like the regulation of airlines.

Senator DANFORTH. Would you, for example, in the area of competition, weigh the efficacy of the antitrust laws versus the efficacy of the FTC proceedings?

Mr. NORTON. That is an example where you have to consider both the FTC and the Justice Department because we have concurrent jurisdiction over several of the provisions of the Clayton Act, and the Sherman Act is in many ways parallel to the FTC Act in its substantive content. You would have to consider the activities of both if you were to do it in a comprehensive way.

Senator DANFORTH. Thank you.

Senator FORD. Thank you, Senator.

You made the statement there about none of the agencies agree. There is one item in this piece of legislation that all agree to, that it is a crime to murder any of the agency officials.

Senator DANFORTH. That was the leadoff point by the man from ICC.

Senator FORD. We have had small businessmen writing in to say they can't understand the new regulations on warranties. Are you issuing regulations that are clear and concise?

Mr. NORTON. Let me make two responses to that. One, I think what we are doing insofar as dealing with complex problems is ongoing. We have hired a consultant to make sure that indeed these regulations are understandable to ordinary people. The impact on consumers and small business is one of the matters which the Magnuson-Moss Act requires the Commission to consider in adopting trade regulation rules. That isn't to say we always achieve with perfection the goal of adopting easily readable and understandable regulations. But we make an effort in that direction. Given the nature of the subject matter we have done well.

Senator FORD. The intent of this legislation is that, for instance, if FTC spends a lot of time investigating businesses. We want you to spend a little of that time investigating yourself. That would be a basic intent of this legislation.

Mr. NORTON. We realize that and we don't mean to suggest that there is no need for that. It is ongoing and in the past 2 or 3 years it has been ongoing at an intense rate, not only in terms of looking over our old trade practice rules and throwing out a whole batch if they didn't make sense anymore. We have looked over the administrative procedures to find ways for the agency to work more effectively and efficiently.

Senator FORD. If this legislation passes we will be looking over your shoulder and we will have oversight and we want to ask you what you have done within a time frame, 360 days, 480, 570.

I appreciate your patience and answers to the questions today. Thank you very much.

[The statement follows:]

STATEMENT OF GERALD P. NORTON, ACTING GENERAL COUNSEL, FEDERAL TRADE COMMISSION

Mr. Chairman, we appreciate the opportunity to present the view of the Federal Trade Commission on S.263, the "Interim Regulatory Reform Act of 1977." Our comments will be restricted to the sections of the bill that directly affect the FTC. At the outset, however, we note our reservations about the desirability of singling out the Commission and certain other collegial bodies for "Interim Regulatory Reform." Most of the subjects of the bill are also problems to varying degrees throughout the government. Some may be more severe in single administrator agencies, offices, or departments than in the multimember agencies covered by the bill. The prescriptions that may seem appropriate in one administrative context for perceived problems may be unnecessary, wasteful or even counterproductive in other contexts.

RECODIFICATION OF RULES

Section 3(a) of the bill would require the Federal Trade Commission within 360 days of enactment to develop a rule recodification proposal. The Administrative Conference of the United States would comment on the initial proposal to Congress and the Commission, and within 570 days of enactment a final rule recodification proposal would be submitted to Congress for consideration by the appropriate oversight Committee. The Commission agrees with what we understand to be the objective of these provisions—to assure a thorough review of outstanding agency rules that may have outlived their usefulness or that may be inconsistent or redundant. However, we do not believe that the rigid remedy

proposed by the bill is needed to accomplish that goal as far as the FTC is concerned, because the Commission has already been engaged on its own initiative in the type of review process the bill would mandate. In May of 1975, the Commission directed the Bureau of Consumer Protection to initiate a program to rescind and replace trade practice rules or industry guides that were outdated in view of changed circumstances, or no longer seemed useful in obtaining compliance with the laws.

In May 1975, the Commission proposed to rescind trade practice rules for 61 industries; 56 were rescinded on January 16, 1976 (41 Fed. R. 2389), and the remaining five were rescinded by the Commission on March 16, 1977. In January 1976, the Commission also published notice of its intention to review another 50 TPR's and invited public comment. On March 3, 1977, the Commission rescinded 27 of those rules and expects to receive recommendations from its staff on the remaining rules before the end of the year. The 110 or so rules involved in this review process accounted for a substantial proportion of the Commission's rules as published in the Federal Register. Therefore, the Commission believes that the passage of Section 3 of S. 263 is unnecessary because its essential purpose will have been fulfilled long before the initial plan would become effective.

Pursuant to the Magnuson-Moss Act of 1975, the Commission has also instituted some 12 major rulemaking proceedings. To the extent that these proceedings are not completed before the expiration of the 360 day period, it would seem that the effect of the bill would be to defer the effectiveness of any such rules for nearly another year. And, if this process is completed before the 360 day period expires, the Commission would in effect be required to redo what it had just done. Indeed, these problems would exist as to any rules recently adopted or proposed. We question whether the resulting substantial commitment of resources—of the Commission and of affected parties—is justified.

The Commission is also concerned that the distinction between substantive and procedural rules appears to be nonexistent. As noted earlier, our substantive rules, codified in 16 C.F.R. §§ 13.1–703.7, are currently revised from time to time as necessary. Our procedural rules, codified in the Federal Trade Commission Organization, Procedures and Rules of Practice 16 C.F.R. §§ 0.7351–4.13, are also frequently altered to meet current needs. If procedural rules are included, the bill would significantly alter the Administrative Procedure Act as to the agencies covered because such rules are not now subject to the notice and comment procedures of that Act, 5 U.S.C. § 553, yet we are unaware of the need for such selective departure from settled principles. The Commission has from time to time followed the notice and comment procedures of the APA even when not obliged to do so, but we think it unnecessary to subject all types of rules to the type of review process contemplated by the bill.

Therefore, while we agree with the principle of systematic or periodic review of agency rules, the Commission already directs substantial effort toward rule revision, and we suggest that the burdens which this section would impose upon the Commission and those affected by its rules would outweigh the benefits likely to be derived from it.

LAW REVISION

Section 4(a) of S. 263 would require the Commission to review all laws relating to it and recommend such revision and codification as may be necessary to improve the administration of its antitrust and consumer protection responsibilities. With the approval of three or more Commissioners, the Chairman would be empowered to appoint a director of law revision. The Commission would be directed to establish an advisory committee on law revision and invite public comment, and would be required to submit to Congress an interim report within six months and within two years a final report designed to facilitate consideration of matters relating to regulatory reform. Again, while we support the general purpose of this section, we do not believe that it is necessary with respect to the FTC.

Section 6(f) of the Federal Trade Commission Act authorizes the Commission to submit to Congress recommendations for legislation. In part as a result of such recommendations, the laws affecting the FTC have recently been reviewed and amended—in the Trans-Alaska Pipeline Authorization Act of 1973, the Magnuson-Moss Warranty-FTC Improvements Act and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. We have also supported additional revi-

sions reflected in S. 642 and S. 2935 passed by the Senate last year and in similar legislation now actively under consideration in the House of Representatives.

In sum, we think the rigid, formulized law revision procedure mandated by the bill is unnecessary with respect to the FTC.

PETITIONS TO INSTITUTE RULEMAKING PROCEEDINGS

Section 5(a) of the bill would amend Section 18(b) of the FTC Act to require that the Commission grant or deny petitions for the issuance, amendment, or repeal of a rule within 120 days after receipt. Upon granting a petition, the Commission would be required to commence a rulemaking proceeding. Upon denial, the Commission would be required to publish its reasons in the Federal Register. If the Commission should deny or fail to act within the 120-day period on such petition, the bill would authorize the petitioner to apply to the district court for an order directing the Commission to initiate a rulemaking preceeding looking toward issuance of a rule. The court would be required to order the Commission to institute such a proceeding if the petitioner showed by a preponderance of the evidence in the record before the Commission that (1) the action requested is necessary; (2) the Commission's failure to act will result in continuation of practices inconsistent with the laws administered by the Commission and (3) the Commission's failure to grant the petition is arbitrary and capricious.

The Commission has several major concerns with this provision. First, it puts the courts in the position of making major decisions about allocating the Commission's limited resources. Partly because of the unique rulemaking procedures mandated by the Magnuson-Moss Act, the Commission rulemaking proceedings generally entail substantial commitment of time and resources, both of the Commission and of affected parties.

The Commission's Bureau of Consumer Protection is presently conducting 12 Magnuson-Moss rulemaking proceedings and a number of other proceedings based on special statutes. Those proceedings occupy approximately 53% of the Bureau's resources. Given budget limitations and new statutory responsibilities, additional rulemaking proceedings may not be in the public interest at the time a petition is filed even if they may be worth considering at a later date.

We think it inappropriate to authorize second-guessing by the courts of such decisions about allocation of resources. As the Supreme Court has repeatedly observed, in rejecting attempts to have the courts pass judgment on the Commission's enforcement policy in administering the law, "the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically" *FTC* v. *Universal Rundle Corp.*, 387 U.S. 244, 251 (1967)).

The desirability of devoting resources to a particular proceeding is a factor that the Commission must consider in determining, as required by the FTC Act, whether it would be in the "public interest" to proceed. Yet, although the bill does adopt the "arbitrary and capricious" standard for judicial review, there is no explicit requirement that the court take into account "public interest" factors as we are required to do by our statute. This could be done by adding a general requirement that the court find that "the institution of the rulemaking proceeding was in the public interest," or by a more specific enumeration of public interest criteria that had to be satisfied. These might include the following: that a rulemaking proceeding and the resulting rule is demonstrably better relative to probable costs and benefits than other approaches to the problem such as adjudicative proceedings, remedial action by other federal agencies or by state or local authorities, legislation, publicity, or private actions; that the Commission has available resources to commit to such a proceeding at the time of the petition which are not already devoted to other proper activities; that the type of rule proposed can be framed with sufficient specificity to provide a meaningful, effective solution to the problem; that the proposed rule will not be unduly difficult to comply with or to enforce; and that the benefits outweigh the costs.

But, even if so amended, we believe the proposal is basically unsound insofar as it authorizes the courts to oversee the Commission's allocation of resources among competing proposals.

Another concern about the bill is that in calling upon the district courts to consider whether practices are "not consistent with" the FTC Act, for example, the bill would require these courts to resolve questions that have traditionally been regarded as within the special expertise of the Commission and subject to only limited review by the Court of Appeals and the Supreme Court.

Finally, we are troubled by the proposed statutory deadline for Commission action on rulemaking petitions. An inflexible requirement that the Commission grant or deny a petition in 120 days inevitably would require the reallocation of resources away from those activities for which no statutory deadlines have been set but to which the Commission has committed resources. Because it involves a substantial commitment of resources, the decision to institute a rulemaking proceeding must be given careful scrutiny. Because of their nature, rulemaking petitions often consume substantial staff resources and time in order to develop information adequate to make a sound decision. The staff must investigate the legal and factual basis for the proffered rule; compulsory process may have to be obtained, and time is consumed in the acquisition and analysis of the material. The petitions may involve complex issues requiring special expertise, which in turn call for the time and expense of consultation with outside experts and other Federal, State and local government authorities.

Moreover, the best disposition of a rulemaking petition may be to place it on the public record for comment together with a series of questions to elicit evidence that bears on the wisdom of such proceedings, rather than summarily to grant or deny it. This was done with a recent petition for a rule requiring tthe use of corrective advertising in certain categories of cases. The bill as presently written does not permit this, but we believe that the opportunity to obtain such information before making a large commitment of resources is essential if we are to allocate our funds and manpower in the best manner.

The Commission has in fact, been concerned that rulemaking petitions be handled expeditiously, and has directed staff to act promptly in forwarding to the Commission recommendations concerning specific petitions. We believe these procedures have permitted careful Commission analysis of petitions and at the same time have provided petitioners with a timely response to their specific requests for Commission rulemaking. We are not aware of any evidence that the Commission's current commitment to take prompt action on rulemaking petitions is inadequate or requires legislative action.

CONGRESSIONAL ACCESS TO INFORMATION

Section 6(a) of the bill provides that Congress shall receive Commission budget or legislative recommendations at the same time they are received by the President and the Office of Management & Budget. At present, a copy of the Commission's original budget request is provided to appropriations and authorizing committees after the President's budget is submitted to the Congress. We have no objection to these provisions.

Section 6(a) also provides that whenever an appropriate Congressional committee makes a written request for documents in the possession of or subject to the control of the Commission (defined to include "copies" of documents), the documents shall be submitted to such committee within 10 days after receiving the request. The bill would also require that whenever the Commission transfers documents in its possession or control to any person in or outside the government it conditions the transfer on guarantee of return of the document to permit the Commission to comply with the Congressional request.

We think that this provision of the bill raises a number of serious practical and legal problems, and we do not believe that it is necessary.

The Commission already regards itself as being obliged under the FTC Act to respond to official Congressional requests for information or documents within its possession absent the infrequent statute precluding such access.

The Commission's policy, moreover, is to comply promptly and to the fullest extent possible with such Congressional requests. Therefore this provision of the bill is not necessary with respect to the Commission. But if it is to be enacted, we believe several amendments are needed.

First, the bill should recognize an exception where other specific statutes include contrary provisions concerning the Commission's disclosure of information or documents, lest such statutes be deemed to have been repealed by implica-

tion. For example, for the past three years Congress has included in the Commission's appropriations acts a provision precluding the Commission from disclosing line-of-business reports to any person outside the Commission. *E.g.*, 90 Stat. 937 (1976).

It is also unclear what effect the bill would have in circumstances where the Commission's possession of the documents is subject to other limitations, such as court orders. In some instances, for example, the Commission has obtained access to documents submitted to a grand jury or another agency but only pursuant to court orders that limit the Commission's use of the documents absent further court orders.

In addition, the application of the bill to documents obtained by the Commission in the course of law enforcement or economic investigations will, we fear, substantially hinder our efforts to obtain voluntary production, because of the consequences the bill would attach to the submission of documents or information to the Commission.

In recent years we have already been facing increased resistance to our investigational efforts because businesses are concerned that whatever they submit to the Commission will be made available to Congress without an adequate opportunity for them to object or to seek appropriate protection for competitively sensitive information. In fact, faced with the Commission's position that it lacks authority to commit itself to withhold materials requested by Congress, a number of companies have sought court orders seeking protection concerning disclosure to Congress.

This concern is likely to be exacerbated by the provisions of the bill which require the return or guarantee of return of the documents if they, or copies of them, are transfered to any person submitting them, or to a person requesting a copy under the Freedom of Information Act, even if the Commission retains copies thereof. This would appear to impose a perpetual record-retention requirement, without regard to the nature of the documents in question, which would be at odds with efforts to reduce the paperwork obligations imposed by the government.

In its activities the Commission often obtains possession of enormous amounts of documents, and at present views itself as being entitled in its discretion to retain those documents (or copies of them) that may have continuing interest to it. If the Commission returns documents to those who provide them, then those persons are ordinarily free to retain them or not as they choose, subject to otherwise applicable record-retention requirements and, of course, the criminal provisions concerning obstruction of justice. Under the bill, however, a company desiring return of documents it submitted to the Commission after the Commission had copied or reviewed them would case the substantial liability and expense of having to retain the documents indefinitely and guarantee their return to the Commission in the statistically unlikely event that they would be subject to a Congressional request.

Accordingly, we believe that this section may encourage resistance to Commission process in the hope that the courts may limit the scope of the Commission's requests, and hence of the company's attendant burdens. Moreover, we are not aware of any evidence that there has been a significant problem with the Commission being unable to respond to Congressional requests because the documents sought have been transferred elsewhere.

Finally, the bill requires that documents be *submitted* within 10 days. Because materials requested from the Commission are often voluminous, and must be obtained from different parts of the Commission, indeed different parts of the country, compliance within 10 days is often physically impossible. Moreover, in our experience such an immediate response is often not required. We frequently arrange with committee staff members that, rather than have the documents physically delivered to them, staff members will examine the documents in our offices. In addition to saving substantial time and money, this practice permits the committee staff to utilize the expertise of our professionals to find relevant materials. We recommend that the bill be amended to read "grant access to" such documents rather than "submit" such documents, thus permitting our current practice to continue. This would follow the pattern established in the Freedom of Information Act. Alternatively, the 10 day period should be enlarged, or provision should be made for its extension.

PROTECTION OF OFFICERS

Section 8 of the proposed legislation would amend Title 18, Section 1114 of the United States Code to make it a federal offense to kill or assault an officer or employee of the Commission assigned to perform investigative or enforcement duties, while engaged in the performance of those duties. The Commission has no objection to this provision.

AVOIDANCE OF CONFLICT OF INTEREST

Section 9(a) provides that no one appointed as a Commissioner after enactment shall represent anyone before the Commission for two years after his or her service as a Commissioner has terminated. Section 4.1 of the FTC's Rules of Practice governs post-employment appearances of former Commissioners and Commission employees. That rule gives the Commission more flexibility than the proposed legislation in determining the propriety of former FTC members or employees representing clients before the Commission. However, the Commission has recently begun a review of Section 4.1 looking towards recommendations for any needed changes.

Although this study has not yet been completed, several general observations may be made. Since potential conflict of interest problems do not appear to be unique to the Commission and the other agencies dealt with by this bill, we question whether legislation on the subject should be limited to those agencies. We also question whether such legislation should be directed particularly to titled officials; a person's duties and degree of access to privileged information may provide more pertinent criteria.

ACCOUNTABILITY

Section 10(a) of the bill would eliminate the exceptions of the Federal Tort Claims Act with respect to actions against the United States based on misrepresentation or deceit on the part of the Commission or any employee or based on a grossly negligent performance of, or failure to perform, a discretionary function, occurring prior to January 1, 1979, provided that the claim is not made with respect to any "agency action" within the meaning of the APA (e.g., rulemaking or adjudication). If the suit is based on performance of, or failure to perform, a discretionary function, a court must find that the Commission or employee acted unreasonably. The bill would also preclude the use of the Commission's appropriated funds to pay the judgment or settlement in such a case.

Section 10 would thus enlarge the waiver of sovereign immunity found in the that the government is liable for personal injury or property damage caused by Federal Tort Claims Act, which currently provides, with specified exceptions, a government employee or agent acting while on official business. As we understand it, the bill would not alter the existing immunity of individual Commissioners or Commissioner employees, as governmental officers, with respect to suits against them individually. We are unsure what actual or perceived problem this provision is intended to remedy, as far as the FTC is concerned. We find it difficult to comment on its need or likely efficacy, nor on the justification for adopting such a change only with respect to selected agencies. We do think it unlikely, however, that the provision may generate burdensome but unmeritorious litigation despite its various limitations, which would presumably exempt such actions as issuance of a complaint or a cease and desist order, or adoption or rejection of a proposed rule. One can readily imagine the possibility that someone dissatisfied with that the Commission or its staff has said or done, or not done, may convert that dissatisfaction into a law suit, which though unmeritorious, could impose substantial litigation burdens. Heretofore the defense of tort claims actions has been handled by the Department of Justice, and we think the Department's views on this provision may be of interest to the Committee.

APPOINTMENT AND TENURE OF CHAIRMAN

Section 11(a) of the bill would amend Section 1 of the Federal Trade Commission Act so as to require the President to appoint one of the Commissioners to serve as Chairman, would subject such appointment to Senate confirmation, and would limit the tenure of a Commissioner as Chairman to a three-year term.

A Chairman, however, would continue to serve as such until reappointed, or until the reappointment and qualification of a successor.

Originally the Federal Trade Commission Act provided that the Chairman would be chosen by the Commission from its own membership; this arrangement was modified in 1950 by a reorganization plan which transferred to the President the authority to choose a chairman from among the Commissioners. Accordingly the Chairman is now chosen by, and serves at the pleasure of, the President. The Commission believes that as a general principle this presidential prerogative is sound. We note in passing that in nearly every instance the person designated as Chairman has been a newly appointed Commissioner subject to confirmation by the Senate with knowledge that he would be designated Chairman.

[The following information was subsequently received for the record:]

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., April 28, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed herewith are the responses of the Federal Trade Commission to the questionnaire enclosed with your letter of April 7, 1977.

We trust that this information will be of assistance to your Committee in its consideration of regulatory reform legislation.

By direction of the Commission.

MICHAEL PERTSCHUK,
Chairman.

Enclosures.

Question 1. To what extent does your agency have a complete cross-referenced catalog of regulations by subject matter, by requirements and by impact upon consumers, businesses and other agencies of Government? Are they readily available for public use and Congressional reference after they have been promulgated? How do you detect overlapping or inconsistent regulations in your agency and between agencies?

Answer. The Federal Trade Commission does not maintain such a cross-referenced catalog of the regulations it promulgates. However, by writing to the Commission a consumer or businesses may obtain references to the Commission regulations, publications, etc., which are pertinent to particular subjects. Such inquiries may be addressed to the Federal Trade Commission, Washington, D.C. 20580. Further, the Commission will soon have all of its Trade Regulation Rules and Industry Guides on an internal computer service which will be available to consumers and businesses at the Commission and through our ten Regional Offices. The address and telephone number of the Regional Offices are appended.

Another source of such information is the "Finding Aids" service operated by the Office of Federal Register. The Federal Register publishes two indices to aid consumers and businesses. One is based on the 50 titles of the United States Code; the other is referenced by agency and subject matter. Both indices are published monthly, quarterly, and annually. Consumers and businesses may gain access to the system by calling the Federal Register ((Area Code 202) 523–5227). The Consumer Information Center of the General Services Administration also indexes regulations by subject matter. The Center is located at 18th and E Streets, N.W., Washington, D.C. 20405 (telephone (Area Code 202) 566–1796).

Regulations promulgated by the Commission are available to the public through the Office of Public Information. In addition, the Commission has committed resources for consumer education for each trade regulation rule. The Director of the Bureau of Consumer Protection has a Special Assistant for Education who, together with the attorney coordinating rule enforcement, is responsible for developing and disseminating information on trade regulation rules and guides to businesses and consumers.

The Commission maintains constant contact with other agencies through formal and informal liaison arrangements. In addition, the staff assigned to each trade regulation rule proceeding are responsible for detecting and averting, whenever possible, overlapping or inconsistent regulations among the Federal agencies.

FEDERAL TRADE COMMISSION'S REGIONAL OFFICES

Atlanta Regional Office, 1718 Peachtree Street, N.W. Rm. 1000, Atlanta, Georgia 30309 (404) 881-4836
Boston Regional Office, 150 Causeway Street, Rm. 1301, Boston, Massachusetts 02114 (617) 233-6621
Chicago Regional Office, 55 East Monroe Street, Suite 1437, Chicago, Illinois 60603 (312) 353-4423
Cleveland Regional Office, 1339 Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio 44199 (216) 522-4207
Dallas Regional Office, 2001 Bryan Street, Suite 2665, Dallas, Texas 75201 (214) 749-3056
Denver Regional Office, Suite 2900, 1405 Curtis Street, Denver, Colorado 80202 (303) 837-2271
Los Angeles Regional Office, 11000 Wilshire Boulevard, Los Angeles, California 90024 (213) 824-7575
New York Regional Office, 2243-EB Federal Building, 26 Federal Plaza, New York, New York 10007 (212) 264-1207
San Francisco Regional Office, 450 Golden Gate Avenue, San Francisco, California 94102 (415) 556-1270
Honolulu Field Station, 605 Melim Building, 333 Queen Street, Honolulu, Hawaii 98613 (808) 546-5685
Seattle Regional Office, 28th Floor, Federal Building, 915 Second Avenue, Seattle, Washington 98174 (206) 442-4655
Washington D.C. Regional Office, 600-C Gelman Building, 2120 L Street, N.W., Washington, D.C. 20017 (202) 254-7700

Question 2. To what extent are you required to include economic impact statements with proposed regulations? How do you determine whether the benefits wil exceed anticipated cost to consumers?

Answer. The Commission is required to include in its statement of basis and purpose accompanying a rule promulgated pursuant to Section 18(a)(1)(B) of the Federal Trade Commission Act "a statement of the economic effect of the rule taking into account the effect on small businesses and consumers." (See Section 18(d)(1), 15 U.S.C. (Supp. V) § 57a(d)(1).)

To facilitate inclusion of the required statement, the Commission has directed its staff to begin evaluating the economic impact of regulations as early as practicable, and to include a preliminary showing at the time staff recommends a proposed rule. In addition, once it is clear that an investigation may lead to rulemaking, the Bureau of Economics assigns one or more staff economists to assist in developing data on the economic impact of the proposed regulation.

Finally, the Commission has committed resources to evaluate the economic effect of trade regulation rules and industry guides after their promulgation. For Fiscal 1977, the Commission has funded impact evaluation studies of the trade regulation rules concerning the Light Bulb Industry (16 C.F.R. Part 409), Retail Food Store Advertising and Marketing Practices (16 C.F.R. Part 424), and Preservation of Consumers Claims and Defenses (16 C.F.R. Part 433).

The Commission engages in a very careful analysis of the costs and benefits of regulation in each instance. The process involves balancing the interests of business and consumers; the Commission attempts to fashion regulations which impose the least costly requirements which are consistent with the public interest.

Question 3. To what extent do you measure paperwork impact of regulations?

Answer: In addition to the analysis of the economic impact of regulation, the staff evaluates the paperwork generated by any proposed regulation. After the promulgation of regulations, the Commission re-evaluates their paperwork impact on its own motion, or in the context of a petition from the affected industry.

For example, the Commission has announced a limited exemption from the notice requirement of the trade regulation rule concerning Preservation of Consumer Claims and Defenses for certain two-party open-ended consumer credit contracts entered into before August 1, 1977. It has also invited com-

ments on an exemption for all seller consumer credit contracts, which are non-negotiable and do not contain waivers of claims and defenses. This was proposed by the National Retail Merchants Association and the American Retail Federation as an approach which would reduce compliance costs while providing protection commensurate with the Rule.

Question 4. To what extent do you determine the effect regulations will have on the courts' workload? Chief Justice Burger recently recommended "judicial impact" statements with new laws. What do you think?

Answer. One of the prime considerations which has prompted the Commission to allocate increasing proportions of its resources away from case-by-case litigation and into rulemaking is the opportunity for dramatic reduction in expensive, time-consuming and repetitive litigation offered by rulemaking. Each rule is likely to entail only a single consolidated judicial review proceeding concerning its validity, rather than the numerous judicial review proceedings that have characterized the Commission's case-by-case adjudication.

Another litigation-saving by-product of rulemaking is the summary nature of rule enforcement. The Commission may bring a civil action in the courts for the recovery of a civil penalty for a knowing violation of a rule defining an unfair or deceptive act or practice. In such actions it is not necessary to prove that the act or practice defined by the rule is a violation of the Federal Trade Commission Act, but merely that the challenged conduct is prohibited by the rule. The simplicity of such proceedings not only should abbreviate the litigation required to administer our rules, but also should serve as a strong enforcement deterrent in the first instance.

The Commission believes that it would be beneficial if Congress specifically considered the impact of new legislation on the courts. Otherwise, burdens are imposed on the courts and litigants that might have been avoided, and the workload of the courts will tend to expand more rapidly than will the courts. See generaly McGowan, "Congress and the courts," 62 A.B.A.J. 1588 (Dec. 1976). One consequence for the Commission has been that there are long delays before its cease-and-desist orders become effective, pending judicial review proceedings in which the Commission is ultimately successful in most cases. This is so even though the statute provides that such cases are to be "expedited," an exhortation now found in various forms in dozens of statutes. In focusing on the judicial impact, Congress could determine, for example, whether judicial review was really necessary as to particular agency activities, if so whether it should be summary or plenary in nature, and like issues.

Question 5. Are you preparing to conduct zero-based budget reviews of your programs?

Answer. The Commission introduced a programmatic budget during Fiscal Year 1975, and has been continually in the process of revising and improving that process.

Most recently, the Commission's staff completed and distributed a detailed manual describing its planning/budgeting process. This process includes both formal Quarterly Budget Review Sessions and Monthly Status Reviews focusing on an in-depth analysis of selected programs from policy and legal perspectives. These are done by the Commission itself. These budget reviews are an established operational process.

As a result of this background, the Commission is uniquely prepared to introduce and conduct zero-based budgeting reviews of its programs. Indeed, we have been working with the Office of Management and Budget and have made a number of suggestions on their proposed procedures to implement zero-based budgeting. Internally, the Commission has several key staff members working on the relatively small number of difficult issues that we must solve to implement effectively zero-based budgeting while complying with the mandate of the Administrative Procedures Act, the Government in the Sunshine Act, and the Freedom of Information and Privacy Acts. We anticipate that these issues will all be solved in advance of the Commission's July budget meetings.

Question 6. What is your view of the "sunset" legislation calling for a phased 5-year schedule of review of federal program functions? Do you favor a "sunset" for agency rules and regulations?

Answer. Addressing first the merits of sunset review of federal programs, the Commission concurs in the principle of periodic reviews of government programs (a) to evaluate the need for continuation of the program, and, (b) to assess

the effectiveness of the implementation of the program to achieve its objectives. We question, however, the desirability of a periodic review for each government program every five years.

Many of the Commission's antitrust and trade regulation problems are of a long-term nature. A period of five years is not a sufficient interval upon which to base a realistic evaluation of the Commission's efforts to deal with such problems. For example, investigations concerning the structure of industries require extensive preliminary economic analyses, complex investigations, often lengthy adjudicative hearings, and perhaps several appeals before the actions are completed. Even then, the full impact of the Commission's actions may not be measurable for several additional years. Under such circumstances a premature review of the Commission's programs could result in a prejudgment that could jeopardize the Commission's continuing efforts. Accordingly, the Commission is hesitant to endorse a de novo review of such programs every five years.

We do not mean to suggest, however, that periodic review of the Commission's Programs would not be beneficial. Such review is presently carried out during the preparation of the Commission's budget proposals, and through oversight by the Congress. Given the long-term nature of the Commission's concerns, and the extensive monitoring which its programs now receive, complete reevaluation of the Commission's programs every five years would serve no purpose that could not be achieved by the same kind of review at more flexible time intervals.

The Commission does not favor an automatic "sunset" for agency rules and regulations. It is continuously reviewing and reevaluating its rules in the course of their day-to-day administration, and in response to petitions from industry and consumers for their amendment.

To illustrate, as we indicated in our prepared statement, the Commission has recently reviewed its existing trade practice rules and rescinded many of them. The Bureau of Consumer Protection is also conducting impact evaluation studies of three trade regulation rules, one proposed trade regulation rule, and three substantive programs to determine their economic impact and continued viability.

Particularly in view of the procedural requirements of the Magnuson-Moss Act, the need to repromulgate regulations every five years could entail an enormous drain on the limited resources of the Commission and on the resources of those affected by the regulations.

Question 7. There have been several bills and amendments to bills providing for a form of Congressional veto over proposed agency regulations. The budget reform law prescribes Congressional action in the form of recissions and deferrals of proposed impoundments. Please comment on the idea of applying the budgetary process to your agency proposed regulations, that is, submitting major rules and regulations (i.e., regulations having a substantial impact on consumers and businesses as opposed to minor regulations relating to internal agency matters and with little or no impact on outsiders) to the Congress for review before they go into effect.

Answer. Aside form its "housekeeping rules" and some of its Rules of Practice, the Commission has no rules which fall within the category of "minor regulations relating to internal agency matters and with little or no impact on outsiders." All of the Commission's trade regulation and trade practice rules fall within the "major rules and regulations" classification. The subject of Congressional review of proposed agency regulations was considered by the Commission during the last Congress in connection with H.R. 3658 and H.R. 8231, and there it attached as a response to this question the statement of the Commission's General Counsel who presented the Commission's position on this legislation to the Administrative Law and Government Relations Subcommittee of the House Judiciary Committee on October 31, 1975.

STATEMENT OF ROBERT J. LEWIS, GENERAL COUNSEL, FEDERAL TRADE COMMISSION

Mr. Chairman, the Federal Trade Commission appreciates this opportunity to offer its views on H.R. 3658 and H.R. 8231.

The Commission is in full accord with the apparent basic purposes of this legislation—to enhance the accountability of government and to arrest the long

trend of government toward the overregulation of our economy and the lives of our citizens. However, the Commission seriously doubts that enactment of either of these bills would facilitate the achievement of these goals.

H.R. 8231 would require all proposed rules and regulations of any Federal agency to be submitted with an explanatory statement to both Houses of Congress. Either House would be empowered for a period of 60 days thereafter to adopt a resolution disapproving the proposal on one of three alternative grounds: that it (a) "is contrary to law," (b) is "inconsistent with the intent of Congress," or (c) "goes beyond the mandate of the legislation which it is designed to implement or in the administration of which it is designed to be used." The 60-day period could be reduced by the adoption of a concurrent resolution approving the proposed rule. Unless so approved or disapproved within the 60-day period, the proposed rule would become effective at the end of the period.

H.R. 3658 would impose a similar review process but is narrower in scope. It would apply only to proposed rules which meet two criteria—first, that the rule is subject to Section 553 of the Administrative procedure Act, and, second, that violation of such rule would subject the violator to a criminal penalty. In addition, H.R. 3658 provides no standards upon which disapproval would be based, but merely authorizes the adoption of a resolution by either House that such House "does not favor the rule."

Since the Federal Trade Commission is not authorized to issue rules which contain criminal sanctions for their violation, H.R. 3658 would have no application to Commission rulemaking. For this reason, and because the broad concept of Congressional review is the central theme of both bills, the comments which follow will focus on H.R. 8231.

Congress created the administrative agencies and Congress clearly has the right to modify the administrative process in any way it chooses—within the confines of the Constitution. In fact, less than a year ago Congress mandated significant changes in FTC procedural authority by enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act. However, before enacting legislation such as H.R. 8231 or H.R. 3658, we suggest that Congress examine the following considerations:

The burdens imposed upon Congress and the costs of further delay may not be justified by the uncertain benefits of case-by-case review;

Existing judicial review may be adequate to curb agency excesses;

While adding to the existing problem of administrative delay, the proposed legislation would add little to the basic oversight and legislative powers of Congress;

An arbitrarily selected period of time (such as 160 days) may not represent a reasonable period for examination of the universe of administrative activity which ranges from the mundane to the momentous;

The legislation could disrupt the salutary features of the administrative process.

THE COSTS OF CONGRESSIONAL REVIEW

Although the Commission supports efforts to improve the accountability of executive and independent agencies, the Commission believes that H.R. 8231 would be likely to create more review, more paperwork and more delay without enhancing the present ability of Congress to control the activities of these agencies. Legislative review of the proposed rules and regulations of every executive and independent agency would involve Congress in the same kind of burdensome detail that caused it to create administrative agencies in the first place. Because of the sheer magnitude of the actions which would be subject to review, Congress could not hope to provide overall meaningful review. The best it could do would be to select an occasional rule for its full attention—and, of course, Congress is fully able to do that now.

The great bulk of the 45,000 pages which comprise the Federal Register for one year (1974) pertains to matters which would fall within the scope of H.R. 8231. The complexity and variety of these regulations correspond to the almost unlimited subject matter dealt with by the various Federal agencies. Assuming that Congress would wish to examine the complete administrative record in conducting its review. Federal Register material represents only the tip of the iceberg. For example, the FTC proposed rule on "Disclosure Requirements and

Prohibitions Concerning Franchising" is based on proceedings extending from 1971 to 1975 and a public record of over 30,000 pages. Based upon the initial public response, the Franchising rulemaking record may well be matched and exceeded in both length and complexity by several rulemaking proceedings recently announced by the Commission.

THE ADEQUACY OF JUDICIAL REVIEW

Section 706 of Title 5 of the United States Code provides that reviewing courts may set aside agency actions which are found to be:

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

"(B) contrary to constitutional right, power, privilege, or immunity;

"(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and

"(D) without observance of procedure required by law (5 .S.C. § 706(2))."

The Commission believes that these standards, which are more inclusive than those set forth in H.R. 8231, should be adequate to curb agency excesses. The omission of any review standards—as in H.R. 3658, for example—would scarcely be an improvement—at least from the viewpoint of an agency trying conscientiously to implement its statutory mandate.

From a reviewing court's standpoint, H.R. 3658 would pose an additional problem: Should the failure of Congress to veto agency action imply Congressional approval? If so, why should there be any need for judicial review at all, except for the examination of Constitutional questions?

The Commission agrees with the conclusion of Professor Robert W. Hamilton in his study of May 8, 1972, which was prepared for the Committee on Rulemaking of the Administrative Conference of the United States, entitled "Procedures for Adoption of Rules of General Applicability": "Legislative review of rules appears to be less desirable than judicial review. Of course, rulemaking of itself is administrative legislation, and abstractly, review by Congress, the delegating authority, may seem appropriate. However, there is doubt as to the constitutionality of such statutes to the extent they omit approval by the President, or involve approval by a committee or a single branch of Congress. Further, there is no machinery for effecting such review, and the experience of legislative review of administrative or executive actions in other areas, e.g., reorganization plans, does not indicate that such review provides a full and careful reappraisal of the substantive decisions by Congress. Judicial review, with its long tradition, appears to provide a more desirable type of review by agency action."

BASIC CONGRESSIONAL AUTHORITY

Since agency activity is already clearly subject to Congressional review and reversal by enactment of overriding legislation it would appear unnecessary to submit each agenry rule individually to Congress. Publication in the Federal Register of such rules, both when proposed and when finally effective, provides notice of each to Congress as well as to the public. Congress on many occasions has exercised its "veto" authority over administrative regulation, by adopting legislation cancelling or modifying such action.

For example, legislation is presently pending in Congress which would reverse the effect of a Commission complaint now pending against soft drink manufacturers and bottlers charging them with illegally restricting the marketing territories of intrabrand competitors. Since this agency activity involves administrative adjudication, it would not be covered by either H.R. 8231 or H.R. 3658. Nonetheless, it provides an example of the ability of Congress to address agency action when it wishes to do so. And, although an aegncy may oppose such overriding legislation, as the Commission staff has opposed the so-called "bottlers legislation," the Federal Trade Commission certainly does not contest the basic authority of Congress to reverse agency action through legislation.

H.R. 8231 would enable one House of Congress to accomplish by resolution what can now be accomplished only by legislation. Quite apart from Constitutional questions, Congress may wish to ponder whether one House should be empowered to veto government action considered lawful and necessary by the other House or by the President.

THE 60-DAY PERIOD

The 60-day waiting period which is prescribed by H.R. 8231 poses a two-dimensional problem. It would incorporate into every rule or regulation a delay which might be unjustified in many instances. On the other hand, as to the rules and regulations selected by Congress for full, substantive review, this period might be too limited to afford adequate Congressional scrutiny. This would be particularly true of regulations and rules involving complex and controversial issues, or rules such as the FTC's Franchising Rule, already mentioned, which are based upon a voluminous record of proceedings.

THE ADMINISTRATIVE PROCESS

The most fundamental effect of H.R. 8231 would be to diminish the effectiveness of administrative rulemaking as a useful tool of modern Government despite its many shortcomings. By routinely injecting a legislative review procedure in the rulemaking process, the bill would once again involve Congress in the maze of administrative details which necessitated their delegation by Congress to the various administrative agencies over the past 75 years. The wholesale retrieval by Congress of the authority it has delegated should be considered only after other alternatives to remedy regulatory excesses have been examined.

OTHER APPROACHES

It is certainly no secret that the American public is dissatisfied with its Government. The public is dissatisfied with Government because there is too much of it and because what it does is often costly, counterproductive and confusing. Instead of resolving these problems, however, H.R. 8231 might only make them worse. We believe that there are better alternatives.

Much can be done by agencies themselves to improve their processes and to increase public accountability. At the Federal Trade Commission over the past few years we have tried to accomplish this by reducing administrative delay, by increasing agency "openness," by applying cost-benefit analysis to agency decisionmaking, and by restructuring our activities on a programmatic basis so as to provide a better foundation for planning and evaluation by the Com mission and for oversight by Congress.

More specifically, with respect to agency rulemaking the Commission has published rulemaking procedures which are designed to maximize public input without sacrificing prompt decisionmaking. These procedures include notice, opportunity for public comment, opportunity for an informal hearing including limited rights of cross-examination, and the promulgation, as part of the final rule, of a statement of basis and purpose including "a statement as to the economic effect of the rule taking into account the effect on small businesses and consumers."

As this Subcommittee knows, these procedures were mandated by the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1974. Nonetheless, these procedures have been recognized and employed by the Commission for several years, and the Commission is in complete accord with the purpose of § 202 of the Magnuson-Moss Act—to enhance Government accountability by maximizing public participation.

The Magnuson-Moss Act also requires the Commission along with the Administrative Conference of the United States to conduct a study and evaluation of the effect of these new rulemaking procedures and to submit a report of its study to Congress. Naturally, the Commission will provide a copy of its report to this Subcommittee.

With respect to the growing problem of overregulation, the Commission has previously urged Congressional reexamination of governmental regulatory policies with a view toward substantial revision or even repal of these policies where warranted. In particular, the Commission has urged that all Government economic activity should be judged, not only by its alleged benefits, but also by its (often hidden) costs. Basically, the Commission believes that meaningful regulatory reform can be accomplished much more effectively by such broad review, rather than by piecemeal after-the-fact examination of every regulatory action of every Government agency.

The House Judiciary Committee has already addressed one example of unwarranted Government restraint by recommending repeal of the anachronis-

tic Fair Trade Laws. This recommendation has been adopted by the full House and is currently pending in the Senate. This salutary action is a prime example of cost-benefit analysis providing the consuming public with one less impediment to a free market and lower prices.

As this Subcommittee knows, the Federal Trade Commission is currently directly involved in improving consumer welfare by eliminating anticompetitive regulation. One example is the Commission's proposed prescription drug trade regulation rule which, if adopted, would have the effect of nullifying restrictive state laws. By making it an unfair practice to restrict or prohibit the advertising of prescription drug prices, this rule is concrete proof that Government is capable of self-generated deregulation.

In conclusion, the Federal Trade Commission is seriously concerned with the problems of Government overregulation and accountability. We are strongly inclined to the view, however, that regulatory excesses can best be resolved, not through ad hoc Congressional review of every regulatory action, but by a systematic review of the basic regulatory policy of each agency. We look forward to cooperating with the Congress in such an endeavor.

Senator FORD. Richard L. Dunham, Federal Power Commission.

STATEMENT OF HON. RICHARD L. DUNHAM, CHAIRMAN, FEDERAL POWER COMMISSION; ACCOMPANIED BY DREXEL D. JOURNEY, GENERAL COUNSEL

Mr. DUNHAM. On April 1, 1977, I forwarded to the committee the Commission's views on S. 263, the Interim Regulatory Reform Act of 1977. I shall not discuss the details of the bill and Commission comments, inasmuch as they are fully set forth in my letter.

I would like, however, to discuss with you some of my general feelings about the philosophical approach embodied in the bill now before the committee.

The act's general provisions for rule recodification and law revision are consistent with the Commission's overall objective of simplifying and streamlining its activities without sacrificing its basic goals for elimination of case backlog and the devolopment of new initiatives to meet complex energy needs.

Regulatory reform, in the best sense of that term, should mean a redesigning and restructuring of the ways in which regulation is implemented so that it serves the needs of the public better.

The bill being considered today incorporates many facets of what has come to be known as "sunset" legislation, insofar as the proposal calls for reexamination of the purposes of an agency such as the Federal Power Commission. S. 263 does not call for terminating Federal agencies on a specific timetable, but it does require a thorough examination of the FPC mission in the light of current needs. This is neither new nor revolutionary. I feel that the basic problem with many of the "sunset" proposals which have been advanced to date is that they deal with a dissolution and recreation of the agencies themselves, and not with the legislation which underlies these agencies.

To the extent that S. 263 approaches reforms in the basic regulatory legislation, it is constructive and beneficial, with some reservations.

Periodic termination, examination, and reenactment of our underlying regulatory statutes would assure that the Nation would have to confront the difficult policy issues which continuously arise as

underlying energy and economic conditions change. I believe, for example, that the Natural Gas Act has become so encumbered by outdated court decisions, and is so much under the weight of irrelevant past energy history, that the basic results of regulation under that act bear little resemblance to those originally intended by Congress.

Termination, reexamination, and reenactment of the Natural Gas Act in light of today's current shortage conditions would provide the Congress with an opportunity for speaking on the fundamental policy questions of price, supply, and curtailment priorities that properly should be made by the Congress and the President, rather than by independent, regulatory commission.

Many of the same comments apply also to our other underlying statute, the Federal Power Act. Restructuring a regulatory agency, without simultaneously restructuring its underlying statutes, will not continue much to reform and will do nothing to update the regulatory mandate. I question the usefulness of the law revision provisions in this bill which require the Commission to recommend formally revisions in an area. There are two problems in that regard. One, law revision very well could be dealing with these major policy questions. We all know the controversies in regard to wellhead price regulations in the natural gas area. We know the problems in regard to plant siting on the electric side.

I have some question if the Commission were required to recommend law revision and basic changes in those two controversial areas and several others, whether that would be desirable. I say that for this reason; if at any time, any Commissioner takes positions on these enormously complex and highly significant economic decisions, questions are raised in people's minds. If Congress does not accept such recommendations, can the Commissioners perform their present assignments under the Natural Gas Act or the Power Act in that regard. We are not legislators or policymakers in that sense.

In the context of a quasi-judicial, quasi-legislative, agency such as the independent commissions are, I question by our taking definitive stands, we really further public interest.

Two major problem areas exist in the provisions of S. 263 as it it is currently worded.

If any regulatory agency, such as the FPC, is to fulfill its legislative mandate in the most effective way, it is neither good sense nor good public policy to tie the hands of the Chairman or Administrator of that agency unnecessarily or arbitrarily.

To mandate budget ceilings, especially in an area as volatile and subject to changes resulting from external and unpredictable forces as energy, restricts the ability of an agency to react quickly and effectively to unforeseen developments.

It would seem far preferable to leave intact the traditional determination process whereby budgets are reviewed and determined yearly, on the basis of more current information, by the Appropriations Committees of Congress.

Since so much of the work of the FPC in the management of its regulatory responsibilities is, of necessity, conducted in courts of law, it does not seem advisable to limit any more than necessary the Commission's ability to undertake its own representation in courts.

In the case of the representation provisions of S. 263 the Commission's viewpoint is quite probably different from that of other agencies.

While the bill would enhance the ability of some other regulatory agencies to undertake court action to enforce regulations, it would place limits on the broad privileges heretofore allowed the FPC.

Since the Commission has acquired, over a period of many years, the necessary expertise and capability to continue to represent itself in litigation, it would appear to be most effective to leave that authority in place. We need to be able to respond quickly. I can think of many examples in that regard, but the enforcement of refund obligations is one. If the Commission is required to observe a 45-day review period in going to the Department of Justice, that delay may give a distinct advantage to those whom we oppose.

The Commission's need for adequate self-representation in the many court actions it must take or defend against places it in a unique position among the agencies that would be affected by S. 263.

If the needs of the several agencies involved and the publics they serve are to best met, it is possible that an approach more individually tailored to the needs of each agency would result in legislation which is more effective in the long run.

In conclusion, I would emphasize that the Commission recognizes the desirability of a general review and recodification of its underlying statutes and regulations, and the legislation under consideration by this committee represents a step toward that objective.

However, I believe that the constructive elements of the act are hampered by some of the restrictive portions, and I am hopeful that the concerns I have raised here today will be carefully considered by the committee in its deliberations on S. 263.

Thank you for this opportunity to share the Commission's views with you. I will be happy to answer any questions you or other members of the committee may have, Mr. Chairman.

Senator FORD. I have a couple of questions I want to ask. It was something that popped into my mind while you were testifying. On Friday morning your agency sent us a copy of your statement and just shortly after that we were notified that the statement was to be disregarded and that drastic revisions would take place.

I want to ask you this question. Was this because of the Office of Management and Budget had anything to say about your testimony?

Mr. DUNHAM. Not at all. The reason is I didn't get to personally read the proposed statement myself until Friday morning. I changed it. Substantively, I don't think the changes differ from the letter we wrote to Senator Magnuson on April 1. There was coloration of personnel writing in the report itself. I believe we sent a copy of the April 1 letter to Senator Magnuson to OMB and to my knowledge we have not received a reply. It was sent to them as a matter of information.

Senator FORD. It was your concern over a statement being sent to a Senator without your having the ability to proof it?

Mr. DUNHAM. I had the ability, but not the time. I had not gone over the statement until Friday morning, because of other activities. If you compare the statement, there is no change from the essential Commission position as embodied in this letter I referred to earlier.

Senator FORD. In your written agency comments of April 1, the FPC states that more time would be needed for the law revision activity called in the bill. This is understandable. Do you have any philosophical difficulty with the concept of the law revision provision?

Mr. DUNHAM. Yes; it runs a little to the remarks I made earlier. It depends on what areas obviously that you are talking about. I really question in these major, areas of confrontations how much is of a concern to us in regard to law revision; in terms of electrical plant siting, LNG siting, wellhead.

The responsibilities we perform are those stated by the Congress or in some areas duties we get indirectly from various court interpretations of the acts.

The *Phillips* decision was the jurisdictional case in regard to wellhead pricing. In regard to curtailments, which is the allocation of the shortfall in supplies, the FPC authority is stated in the Louisiana case; it is only derived indirectly from the Natural Gas Act. It is implicit and not explicit. This allocation or rationing of supplies is a large part of the Commission's current work.

Not a single one of the curtailment provisions of the FPC underway since 1972 or 1973 have been finally approved by the courts. They are extraordinarily contested and cases controversial.

Senator FORD. How many cases do you have in court since 1972?

Mr. DUNHAM. Are you speaking of every major interstate pipeline?

Mr. JOURNEY. There are 19 or 20 major curtailment cases before the commission. They are not all in courts at the present time.

We normally have in the courts of appeal about 100 to 125 cases of all types pending at any one time.

Senator FORD. That have been appealed to courts of appeal.

Mr. JOURNEY. These are appeals in the courts of appeal. They are pending court cases involving FPC decisions.

Mr. DUNHAM. The point here is if the Commission, as a body, recommends, to Congress a specific priority allocation system, whether it be agriculture, boiler fuel, residential, et cetera, that is different than what has been done in cases pending, what we call 467 B priority systems, and that we now have litigated, I think questions would be raised in people's minds, if the Commission position was different than it took in its outstanding order. They can ask how can a commission be recommending to Congress a specific priority system which is different than the one they have adopted in the arguing case.

I do not know how we can do that. In wellhead pricing——

Senator SCHMITT. Could I follow up on that. It is probably because I don't know enough yet, but it seems to me that it would be consistent if you were interpreting past court decisions to follow that procedure within the courts. At the same time you may be trying to make the situation better by recommending different legislation or priorities.

That is consistent. You are the experts. Congress is not the expert.

Mr. DUNHAM. If our 467 B orders had been affirmed finally, somewhere in the court that might apply. But they are not. They have been contested, and they are being contested. I would have a ques-

tion in my mind how we could come forward with legislation as a Commission position, stating a set of priorities that was different than the posture we take in individual cases. The Commission follows a general outline of priority classifications; they are not totally uniform because of a whole variety of reasons, reflecting the individual supply conditions, nature of the market of the pipeline being served. But they tend to be consistently applied.

Somebody could allege that we were being inconsistent. How could we enforce those orders at the same time we were taking a different legislative position.

I think maybe a more correct example is the subject of wellhead priced regulation or deregulation. We have tried as a Commission to stay as far away from that controversy as we could. If we took a position either for expanded regulation, wellhead pricing or deregulation, it would be alleged by one side or the other that we could not regulate something we don't believe in.

That would be true in expanded regulation, increasing wellhead prices, decreasing responsibilities of the FPC, applying FPC controls to intrastate pricing or deregulating new gas. We are accused enough of that at the present time without having to take a specific position.

Maybe I'm making too much of this. But on these major questions that is true. That may not apply to the vast majority of questions, but in these major ones it may apply.

Senator SCHMITT. I'm not sure that would be prohibited by this law revision request. But, still, I should hope that the FPC and other commissions do not have to agree with every regulation that they are required to enforce. I certainly don't think that is necessarily true or possible.

Senator FORD. Why would an agency say breaking new ground in the courts, essentially reverses itself in a law revision proposal.

Mr. DUNHAM. Referring to the example we talked about earlier, the problems of curtailment in the allocation of available supplies of natural gas, each curtailment plan we have now is essentially tailored. It is tailored to both the actual supply situation available to the pipeline and the nature of the market which it serves.

During the course of the proceedings those are modified, either by litigation one way or another. They are changed to the end-use needs, to State regulatory commissions, proposals and other facts.

What we have is, in essence, no one curtailment plan. We may even need one. I really don't want to make a huge point of this, but I think the point I'm trying to make is that the Natural Gas Act, in my opinion, needs substantial revision, needs substantial modification and either grant a lot of the authority we have implicitly, but not explicitly.

The Natural Gas Act has not been changed since 1938, with the exception of the Emergency Natural Gas Act of this year and a minor change in 1942.

The point I'm trying to make is that in my mind there is such a major revision needed of the Power Act and Natural Gas Act that I'm not sure the only approach should be a law revision of the Commission itself.

Senator FORD. How many suits are involved in the courts of appeals, that have been brought by consumer groups and others outside the industrial complex?

Mr. JOURNEY. We can supply that for the record, Senator Ford. My guess is that you would find more of that on the natural gas side. The more recent litigation has ben prompted by consumer group appeals. Certainly that is true in the 180-day sale cases, and some of the activities where the Commission was working with the emergency provisions of the Natural Gas Act.

If you would like, we will supply that for the record.

[The following information was subsequently received for the record:]

These are materials[1] taken from records of FPC's Office of the Solicitor showing litigation commenced essentially by parties other than regulated utilities or natural gas companies. The term "regulated" does not necessarily indicate that the petitioner is not itself in the utility business. A number of appeals are taken by publicly owned or cooperatively owned utility systems who are not themselves directly regulated by the Federal Power Commission. The degree of regulation depends upon the basic statute under consideration. The two basic organic statutes which the FPC administers are the Natural Gas Act and the Federal Power Act.

Senator FORD. I would appreciate it if you would. It is not our intent to tie the agency's hands with respect to budgetary considerations. I think it's our intent to force ourselves to review the agency's activities on a periodic basis.

I say force ourselves because that is one of the things we need to do. For this reason, we propose authorizations on a cyclical basis, which will serve to direct the attention of the authorizing committees to consider the agency.

Could you provide for the record an estimate of the financial resources needed for the next 3 years by the FPC, taking into account now that the mandatory pay increases and the rate of inflation that will occur.

Mr. DUNHAM. I will give it a try. I don't mean to be apologetic, but because of the energy situation, it will be difficult, in our case, to try to anticipate what the Federal responsibility would be.

Senator FORD. Rather than put you on the spot now, why don't you give it some thought and answer that at a later date in writing for the record. Would you do that?

Mr. DUNHAM. Yes.

Senator FORD. Your statement does not express any views on the conflict of interest position. What are your views on limitation on representation for 2 years after the term of service as a Commissioner.

Mr. DUNHAM. Our present rules require essentially that for a period of 1 year instead of 2. I don't see any particular problem with 2 years. No. one, I am not a lawyer, so it won't affect me in any event.

Senator FORD. Congratulations.

Mr. DUNHAM. I have not been concerned with it. I also wonder the extent to which the requirement proposed can really be effective,

[1] The materials are in the subcommittee files.

to practice before the Commission, our rules are former Commissioner can never participate in a proceeding before the FPC in a case in which they have been involvd.

We had a case in the last 3 or 4 months where a former Commissioner—I don't believe he had been a Commissioner for some years—wanted to come into a case that was essentially on appeal again. We denied that.

In a sense, our present rules are more restrictive than the proposals in this bill, our rules and regulations.

Senator FORD. This may be oustide of what the bill is, but it may be something we need to look at a little bit. You do regulate the producer and the distributor?

Mr. DUNHAM. Not the distributor. Just the producer.

Senator FORD. You regulate pricing. You get into prices. That regulates what the distributor can sell or transmission lines can sell to the distributor to ultimately get to the consumer.

Mr. DUNHAM. End-use of the distributor is regulated by State commissions. We stop at the city gate.

Senator FORD. How many cases do you have pending as it relates to the producer?

Mr. DUNHAM. 1,000.

Mr. JOURNEY. Are you speaking of dockets or producers? Not that many active cases are pending. Under our national rate proceding, RM 75–14 we do ratemaking by the rulemaking process. We can give you a list of the dockets, but that would probably tend to mislead you because a lot of those independent producers are themselves covered by this overall rulemaking, ratemaking procedure.

We have individual cases on special relief and we have optional certification procedure cases and then we have a series of cases involving offshore lines and certificate cases on offshore lines bringing gas onshore. We can give you that number.

Senator FORD. You say there are thousands?

Mr. JOURNEY. Thousands of producers, but not necessarily cases in the sense of trying them one at a time.

Senator FORD. Is there a way that the FPC could get into the position of eliminating your consideration of the producer and still keep a tap open or close it? What I am trying to get to is that your backlog is primarily from producers and your nitty-gritty cases, you are not able to devote as much time to as maybe you would like to.

I am not as familiar with it as I want to be or as I am going to be, but in this energy field, and the night and day work that you all did during the crisis, and I fussed some, as you know, and thought I had a right to or I wouldn't have done it—and some people over there agreed with me, but I'm trying to look at the load you are carrying as it relates to what you have to do and you may never get caught up with thousands of applications from producers for their problems that come before the FPC.

Mr. DUNHAM. Well, our caseload or workload is composed of a variety of things. I think the single factor which has impacted our caseload so substantially in the last 3 or 4 years is the rapid change in basic energy prices which occurred because of OPEC situation, shortages and because of inflation and so forth.

On the electric side, historically our backlog has not been that bad. It has been manageable. In the last 3 or 4 years, it has become unmanageable, largely because of the rapid fuel changes and fuel cost changes.

So that what has impacted our workload more than anything else is the enormous amount of time that we have to spend, do spend, on pricing questions. I do not feel our caseload is unmanageable. The pipeline ratemaking, the typical utility ratemaking can be handled.

It's these two or three very controversial subjects which has pulled our people——

Senator FORD. Are these substantive issues before the Commission that you need to devote more time to, other than the more or less significant aspects?

Mr. DUNHAM. That's correct. To give you an example, the Alaskan transportation bill. Those types of things take up much of the Commission and staff time—I wouldn't want to put a percentage on it—but an enormous amount of time.

Senator FORD. We would like to relieve you of the pressure that is on you and you would still have the end result, without having the paper shoveling.

Mr. DUNHAM. If some of these basic issues, plant siting, wellhead siting and so forth were resolved—there has been uncertainty and debate over the last 10 years over wellhead pricing—but the uncertainty has caused problems.

We have to get these problems solved.

Senator FORD. How many attorneys are assigned to the producer cases as opposed to all other cases?

Mr. JOURNEY. Presently there are 17 that do work on producer work and offshore pipeline work, including cases on appeal and work which I and my immediate assistants carry.

Senator FORD. Is that the total number in your agency?

Mr. JOURNEY. In OGC there are about 100 lawyers. Overall, as between gas and electricity, they are split about 50–50.

Mr. DUNHAM. Many staff persons are in the Bureau of Natural Gas and other offices, that work on gas matters.

Senator FORD. How many nonattorneys do you have?

Mr. DUNHAM. Applying to producers?

Senator FORD. Yes.

Mr. DUNHAM. I don't know how many offhand.

Senator SCHMITT. I will submit my questions for the record, but it does sound that if we could simplify the law, we could make the FPC a manageable organization again.

Mr. DUNHAM. That is right.

Senator SCHMITT. I hope some of us can work in that direction as this year or the next year goes by.

Mr. DUNHAM. I wanted to comment in regard to regulations you may be interested in. The President has assigned to us the responsibility for administering the Emergency Natural Gas Act. We decided consciously at that point we would not adopt any regulations.

But we had a whole set prepared, maybe not quite that thick and they are ready. Of course, the President terminated the emergency in some sense last Friday. I asked a couple of lawyers that were helping

me on to what extent they missed the regulations, and they said, interestingly enough, not a single question came up that the regulations would have answered.

[The following information was subsequently received for the record:]

FEDERAL POWER COMMISSION,
Washington, D.C., April 15, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed please find our response to your letter, dated April 7, 1977, concerning certain questions from Senator Schmitt for inclusion in the hearing record. The responses are keyed to his questions.

If I can be of further assistance in this matter, please let me know.

Sincerely,

RICHARD L. DUNHAM,
Chairman.

Enclosure.

RESPONSE TO QUESTIONS FROM SENATOR HARRISON H. SCHMITT, SENATE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION.

Question. To what extent does your agency have a complete cross-referenced catalog of regulations by subject matter, by requirements and by impact upon consumers, businesses and other agencies of Government? Are they readily available for public use and Congressional reference after they have been promulgated? How do you detect overlapping or inconsistent regulations in your agency and between agencies?

Answer. Title 18, CFR, contains a complete reference of the regulations under which this Commission functions. It is readily available through the Federal Register to the public and to Congress. It is not, however, cross-referenced by impact on consumers, businesses or on other agencies. Each of these areas is addressed, case by case as required, in the Index to FPC Actions published under the Freedom of Information Act. No other standardized reference is available currently.

As to regulation changes, coordination is made within the Commission as well as with other governmental agencies prior to publication of any proposed changes. It is necessary to notice or publish such changes in the Federal Register, and overlapping or inconsistent regulations are subject to scrutiny and comment by the public, other agencies and Congress in this manner.

Question. To what extent are you required to include economic impact statements with proposed regulations? How do you determine whether the benefits will exceed anticipated costs to consumers?

Answer. Commission decisions that will have a significant economic impact include an analysis of that impact in cost-benefit terms. Here are two examples:

Opinion No. 699–H (December 4, 1974): "The Impact on the Consumer," pages 54–59 (Appendix 1).

Opinion No. 770–A (November 5, 1976): "The Cost Impact of Opinion No. 770–A", pages 122–123; "The Costs and Benefits of Opinion No. 770–A," pages 124–126; and Appendix D. "Refined Estimates of Short-Run Price Impacts, and Extended Conservation Analysis, of Opinion No. 770." (Appendix 2).

The question whether the benefits will exceed the anticipated costs to consumers must be answered in the context of the requirements of the Natural Gas Act and the Federal Power Act, the principal statutes administered by the Commission. These statutes impose upon the Commission the responsibility for establishing "just and reasonable" rates. As interpreted by the courts, the "just and reasonable" standard requires the Commission to allow rates that are adequate to cover the necessary cost of service of the regulated companies. The benefits to consumers represent the benefits of receiving reliable service at the lowest reasonable cost. Implicit in each rate determination by the Commission is a finding that the cost basis for the rates includes only those costs that reflect prudent management decisions.

In issuing rulemaking orders that impose new regulations the Commission is required to evaluate the benefits of the regulations in relation to the additional costs to the companies. For an example of this point, see pages 2–8, Order No. 556, November 22, 1976. (Appendix 3)

Question. To what extent do you measure paperwork impact of regulations?

Answer. All Federal Power Commission proposed regulations are subject to rulemaking procedure. The public, concerned parties and the industry are invited to submit their comments in regard to the cost of compliance and the paperwork necessary to conform to the proposed regulation. When a proposed regulation involves the reporting of information on a form, the form must be approved in advance by the U.S. General Accounting Office (GAO) as required by the change to 44 U.S.C. 3512. In the justification of the report to the GAO the Commission is required to supply an estimate of the Respondent Burden and an estimate of the cost to Federal Government. GAO then publishes a notice in the Federal Register that states the agency's name, the form number and its title, a general statement of intent of the form, the number of respondents, the estimated number of manhours for compliance, and a request for comments by potential respondents to GAO. Through this process, the Commission does measure the paperwork impact of regulations, and take it into account in the final rulemaking action regarding regulations of this type.

Question. To what extent do you determine the effect regulations will have on the courts' workload? Chief Justice Burger recently recommended "judicial impact" statements with new laws. What do you think?

Answer. Through the notice and comment process which precedes the issuance of new regulations, the Commission is apprised of the concerns of the general public with respect to the proposed regulations. Thus, in promulgating new regulations, the Commission is often aware of certain concerns which might give rise to legal challenges after issuance. Such challenges are normally initiated by a rehearing application filed with the Commission, since such applications are a prerequisite to seeking judicial review. *See,* 16 U.S.C. § 8251 and 15 U.S.C. § 717r.

However, the Commission's primary responsibilities in issuing new regulations are insuring that we have acted within our authority, statutory or otherwise, and that the regulations are in furtherance of the public interest. While we may be aware of potential court challenges, the Commission has no control over parties seeking subsequent court review. Indeed, it would be inappropriate for the Commission to fail to take action in furtherance of the public interest when the sole reason for such failure is the possibility of court challenge.

In summary, the Commission has no role in determining the effect regulations will have on the courts' workload.

Question. Are you preparing to conduct zero-based budget (ZBB) reviews of your programs?

Answer. Although the Office of Management and Budget has not yet issued final instructions on ZBB, the Comptroller of the Federal Power Commission is working with the OMB staff on the application of ZBB in the Commission. The intent is to have full implementation of the ZBB process for fiscal 1979.

Question. What is your view of the "sunset" legislation calling for a phased 5-year schedule of review of federal program functions? Do you favor a "sunset" for agency rules and regulations?

Answer. Although the goals of "Sunset" legislation are highly laudable it is unlikely that such legislation can fully accomplish its purpose as it relates to the Federal Power Commission. A more desirable and effective regulatory reform would be to review, reexamine and reenact the underlying statutes which form the basic charter under which the Federal Power Commission operates. Such a review of the Natural Gas Act and the Federal Power Act, for example, would enable Congress to address the fundamental policy questions of price, supply, and curtailment priorities and would help to update the Acts to reflect current energy conditions. In general, reform along these lines is more likely to be effective in solving the problems confronting regulatory agencies than scheduled review procedures which do nothing to solve these fundamental and underlying problems.

"Sunset" for agency rules and regulations is a desirable reform if it accompanies a similar review of an agency's underlying charter. Since rules and regulations reflect a structure mandated by the enabling statute, they are likely to

be only as effective as the enabling statute. Review of agency rules should therefore be conducted as part of an overall review of the agency's fundamental charter.

Question. There have seen several bills and amendments to bills providing for a form of Congressional veto over proposed agency regulations. The budget reform law prescribes Congressional action in the form of rescissions and deferrals of proposed impoundments. Please comment on the idea of applying the budgetary process to your agency's proposed regulations, that is, submitting major rules and regulations (i.e., regulations having a substantial impact on consumers and businesses as opposed to minor regulations relating to internal agency matters and with little or no impact on outsiders) to the Congress for review before they go into effect.

Answer. Under section 309 of the Federal Power Act (16 U.S.C. § 825h) and section 16 of the Natural Gas Act (15 U.S.C. § 717o) rules and regulations of the Federal Power Commission become effective thirty days after publication, unless a different date is specified. This procedure complies with the present provisions of section 553 of the Administrative Procedure Act.

Legislation requiring submission of proposed rules and regulations to Congress for review inevitably would delay the effectiveness of our rules and regulations. If the rule or regulation were to be proposed while either House was not in session (such as a period of adjournment), effectiveness of the rule could be delayed indefinitely. While a limited extension of the effective date of a new rule could be accommodated in certain FPC matters, we are faced with an increasing number of situations, responsive to national energy needs, which require a final determination within the shortest possible period of time. These urgent matters often involve the type of rules and regulations (those having a substantial impact on consumers and business) which your inquiry would indicate to be sent to Congress for review.

In addition, review of major agency rules and regulations would be an ambitious, time-consuming undertaking on the part of Congress. Under present law the courts may review agency rules and regulations upon petition of a party who asserts that they are contrary to law or go beyond the mandate of the legislation which they are designed to implement. We recommended that review of unlawful agency rules and regulations remain with the courts rather than initiating a procedure for Congressional review. If Congress is concerned that agencies misinterpret or exceed congressional intent when administering the law, it seems the better course to hold oversight hearings, direct investigations by the General Accounting Office, or spell out congressional intent clearly through amendments of the enabling acts rather than to interject further delay into the administrative process.

Appendix I

D. The impact on the consumer

In prescribing a just and reasonable national base rate of 50 cents per Mcf, we have carefully considered the impact of this rate upon the cost paid by the consumer for natural gas. In order to evaluate the impact of this rate upon the price paid by the consumer, we have estimated the potential impact on the price charged the residential gas consumer in four widely dispersed metropolitan areas of the United States.

Assumptions must be made in order to estimate the potential impact of increased prices for new supplies of natural gas. In the following table, it is assumed that new gas supplies including supplies sold pursuant to renegotiated contracts will account for five (5) percent of the supplies delivered in the first year and will increase by an additional 5 percent of the total volumes delivered each following year. It is further assumed that the volumes delivered to these four markets will remain constant over the next five years. To the extent that increasing curtailments reduce the volumes of gas available at the prices paid during the calendar year 1973, the estimated increases shown in Part IV of the table will be somewhat greater. The prices shown in the table reflect the annual escalation of 1.0 cents per Mcf, a seven percent production tax, a Btu content of 1,030 Btu per cubic foot, and a gathering allowance of 1.0 cents per Mcf. The prices are computed as provided in Appendix D to Opinion No. 699, —— F.P.C. —— at ——. The prices do not reflect any adjustments that may result from the biennial review prescribed by this opinion.

POTENTIAL IMPACT OF 50-CENT BASE RATE, AS ADJUSTED, ON RESIDENTIAL BILLS IN SELECTED MARKETS ASSUMING 5 PERCENT INCREMENTS

Classification	Residential market areas			
	Washington, D.C.	Boston, Mass.	Chicago, Ill.	Los Angeles, Calif.
I. Average cost of natural gas service for calendar 1973 in dollars per Mcf [1]	1.67	2.37	1.20	1.16
II. Increase in the cost of natural gas assuming 5 percent increments of gas purchased at base rate, as adjusted: [2]				
(a) 5 percent (1974) 56.38 cents	.0169	.0169	.0169	.0169
(b) 10 percent (1975) 57.48 cents	.0349	.0349	.0349	.0349
(c) 15 percent (1976) 58.59 cents	.0540	.0540	.0540	.0540
(d) 20 percent (1977) 59.70 cents	.0742	.0742	.0742	.0742
(e) 25 percent (1978) 60.81 cents	.0955	.0955	.0955	.0955
III. Adjusted average cost of natural gas (dollars per Mcf):				
(a) 1974	1.6869	2.3869	1.2169	1.1769
(b) 1975	1.7049	2.4049	1.2349	1.1949
(c) 1976	1.7240	2.4240	1.2540	1.2140
(d) 1977	1.7442	2.4442	1.2742	1.2342
(e) 1978	1.7655	2.4655	1.2955	1.2555
IV. Percent change as result of 50-cent price for each increment (percent):				
(a) 5 percent	1.01	0.71	1.41	1.46
(b) 10 percent	2.09	1.47	2.91	3.01
(c) 15 percent	3.23	2.28	4.50	4.66
(d) 20 percent	4.44	3.13	6.18	6.40
(e) 25 percent	5.72	4.03	7.96	8.23

[1] Source: AGA's Gas Facts for 1973.
[2] Volumes based upon form 11 data for 12 mo ending December 1973, and assumes constant level of total volumes.

If new supplies at the national rate constitute a 10 percent increment of the total supplies delivered in the first year and an additional 10 percent increment each following year, the increase attributable to the wellhead price of gas paid by consumers in residential market areas would be 19.1 cents per Mcf by 1978. This would result, by 1978, in a total price per Mcf of $1.8610 in Washington, D.C., $2.5610 in Boston, Mass., $1.3910 in Chicago, Ill., and $1.3510 in Los Angeles, Calif. The percent changes in the prices paid by residential consumers in these same markets would be:

Year	Washington, D.C.	Boston, Mass.	Chicago, Ill.	Los Angeles, Calif.
1974	2.02	1.42	2.82	2.92
1978	11.44	8.06	15.92	16.46

Furthermore, 50 percent of the total volumes of gas being sold in interstate commerce will be priced at the national rate by 1978 if the annual increments are 10 percent.

Referring to the table and accompanying text, it appears that the increases in the average residential price will range between 0.71 percent and 1.46 percent in the first year and between 4.03 percent and 8.23 percent after five years if total volumes of gas priced at the national rate account for an annual increment of 5 percent of the total volumes delivered that year. If the annual increment is 10 percent then the increases will range from 1.42 percent to 2.92 percent for the first year and from 8.06 percent to 16.46 percent after five years. The increases will tend to be smaller, percentage-wise, as the distance from the major producing areas to the consumer market increases, but the dollar impact will be determined by the relative importance of new gas supplies in each market's total gas supply. In addition, of course, there will be an indirect impact upon consumers to the extent that increased gas prices paid by commercial and industrial customers are passed on in the form of higher prices for goods and services. As noted below, however, the increased availability of gas supplies at the national rate will, in many instances, enable commercial and industrial customers to continue their use of gas rather than converting to a higher cost alternative fuel. In these cases, the increased price for gas might well prove to be deflationary rather than inflationary.

In evaluating the overall public interest, we must consider the benefits to the consumer of an incremental supply of gas to provide reliable gas service compared to the consumer detriment if natural gas supply is reduced. The increased consumer cost attributable to higher wellhead gas prices is more than counterbalanced by the more probable assurance of continued service. It should be noted that even with the increased cost of gas to the consumer as a result of this decision the price paid for gas will remain less than the price of alternate fuels in these same markets. These customers will, of course, be confronted with even higher energy costs when demand is referred to other higher-priced alternate fuels because an adequate and reliable supply of gas is not available. We believe that it is in the best interest of the American consumer to pay the higher price for gas which is necessary to induce expanded exploration and production efforts than it is for that same consumer to pay even higher prices for other fuels, if substitutable. To the extent that incremental supplies of gas will be made available to consumers at less cost than alternate fuels, inflationary pressures will be diminished and we will more effectively allocate and utilize our energy resources.

Since more than 50 percent of the energy fueling our industrial economy is natural gas,[123] which in many applications cannot be efficiently displaced by other fuels, the augmentation of our natural gas supply will contribute to our productivity, will reduce unemployment, and will assist in maintaining a viable economy.[124]

Future supplies of gas required to replace the volumes being consumed today as well as increase the deliverable volumes to meet anticipated future demands will come from greater depths onshore and from both greater well depths and water depths offshore. These supplies will not be discovered and produced at yesterday's prices so it is important that we establish a price that will encourage the development of those higher cost supplies. The consumer must pay this price if he is to obtain the volumes of gas required to satisfy his demands for a reliable, non-polluting energy source.

In establishing a base rate of 50¢ per Mcf as the national rate and reinstating emergency and limited-term procedures in Opinion No. 699–B, we are carrying out our responsibility as a Commission to see that consumers receive adequate and reliable gas service at reasonable prices. In *Hope*[125] the Supreme Court expressed the essential doctrines stating that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks,"[126] and that the Natural Gas Act was "to protect consumers against exploitation at the hands of natural gas companies."[127]

Appendix 2

3. THE COST IMPACT OF OPINION NO. 770–A

Using the *adjusted* flowing gas volumes and dollar impacts as a base, two further modifications must be made to ascertain the projected dollar impact of this Opinion. First, as stated earlier, we have modified the rate for 1973–74 gas as set in Opinion No. 770 to 93¢ per Mcf, increasing at 1¢ per annum beginning January 1, 1977.

The resultant volumes and dollar impacts are shown in Exhibit 12. The total volumes affected over the next 12 months are estimated at $1.49 to $1.78 billion.

Spread over the approximate 11.5 Tcf of estimated gas flowing interstate over the next 12 months, this dollar impact translates between 13¢ and 15.5¢ per Mcf. The average residential gas rate for the forthcoming 12 month period, excluding the increases herein, would be about $2.01 per Mcf [162] so the percentage price increase for residences would amount to between 6.5 and 7.7 percent. The average residential bill would rise from $241 per year [163] to between $256 and $260 per year, up $15 to $19 over the next twelve months. We reiterate that this national

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[123] Federal Power Commission, Natural Gas Survey, Volume I, Chapter 6, "Total Energy Supply and Demand," at pages 40 and 93 (Preliminary Draft).

[124] Employment Act of 1946, 60 Stat. 23 (1946), 15 U.S.C. § 1021 (1970).

[125] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

[126] 320 U.S. at 603.

[127] 320 U.S. at 610.

[162] The average residential rate in 1975 was $1.69 per Mcf (Gas Facts). Allowing for the 19.3 percent gas price increase from July 1975 to July 1976 (BLS) results in an average rate of $2.01 per Mcf.

[163] The average residential consumption in 1975 was 120 Mcf. Allowing for the effects of the $2.01 rate, with consumption at 120 Mcf/year results in an average 1976 bill of $241 per year.

average cannot be assumed to be correct for all customers, as different pipelines will have different price increases, depending on the vintages of the gas they purchase. These projections on residential impact may be somewhat understated since, as the appended staff report concludes, pipelines with residential consumption comprising a large fraction of their total throughput appear to be more dependent upon the newer, more costly, wells.

	Recompletion exclusion (percent)	Estimated volumes (Tcf)	Price difference (cents per Mcf)	Dollar impact (billions)
High estimate:				
1973-74	5	1.294	[1] 43.3	$0.560
1975-7/26/1976	30	.996	92.9	.925
Subtotal 1973-July 26, 1976		2.290		1.485
Next 12 mo		[2] .315	92.9	.293
Total impact (high estimate)		2.605		1.778
Low estimate:				
1973-74	10	1.226	[1] 43.3	.531
1975-July 26, 1976	45	.783	92.9	.727
Subtotal 1973-July 26, 1976		2.009		1.258
Next 12 mo		[2] .247	92.9	.229
Total impact (low estimate)		2.256		1.487

[1] Weighted average price differential (including State taxes) based upon 770 volumes as filed by producers and expanded to include other small producers and pipeline production:

$1.252 \times (98.6-56.5)=0.527 \quad (98.6=93\times 1.06)$
$.139\times(128.2-73.5)=.076 \quad (128.2=98.6\times 1.3;\ 73.55=6.5\times 1.3)$
$.040\times(98.6-56.5)=.017$

$1.431 \qquad .620$

$$\frac{0.620}{1.431}=0.433$$

[2] New dedications assumed at same rate as past 19-mo period 1975-July 26, 1976. E.g., for the high estimate:

$$\frac{0.996\times 12\times 1}{19}=\frac{0.315\ \text{Tcf}}{2}$$

4. THE COSTS AND BENEFITS OF OPINION NO. 770—A

It is important to make clear that these are average impact estimates associated with the direct effect of this Opinion. They do not reflect, among other things, that:

(*a*) Any given distribution company may experience substantially higher or lower rate increases due to the particular mix of supply sources of their pipeline suppliers;

(*b*) In some states intrastate prices may rise because the state allows "most favored nation" clauses in sales contracts, thus tying those contract prices to the highest price in the field (a clause disallowed by this Commission for interstate sales contracts since 1961);

(*c*) Some state regulatory commissions may raise the price of intrastate gas subject to their jurisdiction at the same time; and

(*d*) Some pipeline transportation and distribution companies might have rate increases due to increased costs other than purchased gas which go into effect at the same time.

At the same time, any calculation of the benefits of this Opinion must be cast in terms of the increased availability of natural gas that is less expensive than its substitute, and the fundamental value of husbanding a scarce natural resource through conservation in response to the higher prices. While it is difficult to specify the benefits with as high a degree of accuracy as we have specified the costs above, the following items must be considered:

(*a*) the most frequent substitutes for natural gas are oil and electricity; imported oil at $13.50 per barrel is equivalent to a wellhead price of $2.00 per Mcf;[164] electricity at 4 cents per Kwh is equivalent to a wellhead price of

[164] 5.62 MMBtu's per barrel less 40 cents mcf transmission charges (1,300 miles at 3 cents per 100 miles).

approximately $10.80 per Mcf;[165] the most recent costs of LNG and SNG lie somewhere between these two; if the 0.315 Tcf of new gas production capacity projected to commence over the next 12 months at an average new rate of $1.44 per Mcf would not have been forthcoming at the Opinion No. 699–H rate, and instead had been replaced by the above-mentioned alternative energy sources, the benefits resulting from the price differentials are apparent;

(*b*) if sufficient gas production were not forthcoming, the conversion costs for using a different form of energy (*i.e.*, oil or electricity) would be considerable;

(*c*) the ever-increasing effect of spreading pipeline and distribution company depreciation and fixed charges over smaller volumes of throughput would cause a substantial increase in rates for the consumer;

(*d*) there have been estimates made of the long run costs and benefits of Opinion No. 770; the staff report appended to Opinion No. 770 estimates the net benefit in 1980 to be $2.0 billion per year;[166] FEA estimates the average annual residential fuel bill would be 13% less in 1980 and 10% less in 1985 as a result of the rate increases of Opinion No. 770: "These reductions would result from less substitution of more expensive fuel oil for natural gas in the residential market."[167]

F. Summary

The Commission does not deny that Opinion No. 770 will have a significant economic impact. However, we firmly believe that the resulting increased gas supplies and subsequent reduced reliance upon more expensive alternative fuels not only mitigate the current cost to the consumer, but will result in a substantial long-term saving. The Natural Gas Act provides for the determination of a cost-based rate. Costs have increased dramatically and under the Act will flow through to the ultimate consumer at some point. Accordingly, we have reached the determination that rising costs and decreasing supplies must be squarely faced. We have done so in this proceeding in an attempt to stem the worsening natural gas shortage.

While the rate structure and eligibility criteria established herein result in a large dollar impact (because of the amount of eligible gas already flowing), the new rate structure established herein also remains in effect until the next biennial review. Such rates will affect the producers' expectation of the subsequent biennial rates. While we cannot bind the decisions of future Commissions, we believe we have used the best available methodology for prescribing national rates. If producers share these beliefs, their exploratory and developmental decisions will be affected accordingly. Therefore, we do emphatically believe that our actions are in the consumers' best interest and that we are fulfilling our Congressional regulatory mandate which, as determined by the courts, is to provide for an adequate supply of natural gas at the lowest possible cost to the consumer.

Appendix 3

Proposed Form No. 108, as revised, is divided into six major schedules, numbered 501 through 505, and 507, plus Schedule 0000 for footnotes, Schedule 1000 for any supporting documentation deemed necessary by the respondent, and a schedule to identify the name of the party to contact regarding the form. Schedule 501 will show summary sales volumes and revenue data for jurisdictional sales. Schedule 502 will show the rate schedule number, the date of the contract, the location of the producing acreage, the type of filing and term of the contract, certificate information and quality specifications. Schedule 503 will elicit data pertaining to indefinite pricing clauses, contract tax reimbursement provisions, fixed periodic rate increase provisions, seller additive or buyer deductive charge provisions, actual delivery pressure and Btu content. Schedule 504 will reflect the current effective and proposed rates and their present status under the rate schedule. Schedule 505 will list any other parties whose interest is being sold under a rate schedule issued in the name of the filing party, the annual sales volumes attributable to each such party, the amount of any revenues collected by any party subject to refund, and projected deliveries for the next year. Sched-

[165] 3,412 Btu's ped Kwh, allowing 90 cents per Mcf for transmission and distribution charges.

[166] *FEA* "Fact Sheet," July 1976, p. 2.

[167] *See*, Opinion No. 770, — FPC —, Appendix D, p. D–20.

ule 507 will replace the form presently used for the submission of rate increase filings. Schedule 506 has been reserved for future Commission use.

With the exception of the Order No. 539-type data, information similar to that proposed to be collected on Form No. 108 had previously been gathered on various FPC forms, including contract analysis data collected pursuant to an August 1973 order in Docket No. R-478. In order to minimize the burden on respondents, the Commission has agreed to undertake the transfer of the previously filed contract analysis material to the new form, leaving the party filing the form with the obligation only to verify the information and complete the newly requested items.

The Notice provided a period for comments on the proposed rulemaking and comments were filed by forty parties. The objections to the form were of five particular types: (a) arguments against the information to be collected in furtherance of Order No. 539, (b) opposition to the producer rather than the Staff updating the previously filed data, (c) disagreement with the requirement to file the form on magnetic tape, (d) objection to gathering information on actual gas treating and quality costs, and (e) requests for clarification or modification of the instructions and the format of the proposed submittal. As to the latter, having carefully considered all such comments, the Commission has modified and clarified Form No. 108 to conform to the requested changes.

The purpose of Form No. 108 is to provide the Commission, by a standardized format adaptable to a computerized system, with a capability for review and analysis of all rate schedules currently on file or to be filed. Most of the information to be collected on Form No. 108 is now submitted on other forms which will be eliminated. Thus, the necessary data would now be filed on one form, thereby eliminating the burdensome effort of filing individual forms containing duplicative information. This consolidation of filing will assist all parties, including the Commission, since a centrally located information base will decrease the time presently required to process rate change applications, and will substantially reduce the extensive data gathering necessary to national and/or area rate proceedings. The form will also provide an up-to-date information source on the volume of gas flowing in interstate commerce and the contractual provisions under which these supplies are being sold.

One of the major objections to the proposed form centered on Schedule 506, which was designed to implement Order No. 539. Pursuant to the Commission's action in Order No. 539-B, Schedule 506 has been deleted in its entirety. In its place respondents will be required to submit an estimate for the up-coming year of the volumes that are expected to be delivered under the subject rate schedule, the actual sales under the rate schedule for the current year, and in the initial reporting year only, the actual annual sales under the rate schedule for the four years prior to the current year. We find that this requirement of information to be submitted represents an inconsequential change from the data sought by the orginal Schedule 506 as it appeared in the Notice Of Proposed Rulemaking. Therefore, no further notice of this amendment to the form is necessary, especially since the burden of filing the revised material is substantially less than as originally constituted.

The historical sales volume data will permit the Commission to compute for future periods, by rate schedule, the rate of decline or increase of deliveries under that rate schedule. The Commission can then compare the rate-time performance projection with the current year deliveries and the projected succeeding year deliveries. To the extent that the filed data does not comport with the historical trend, further investigation by the Commission may be required. In addition to the material submitted on Form No. 108, data filed on Form Nos. 15 and 40 will be used to assist the Commission in determining where a more detailed inquiry is called for by providing information on nonproducing reservoirs and shut-in wells. This information will assist us in enforcing certificated obligations pursuant to the "prudent operator standard" enunciated in Order No. 539-B.

A second reason proposed by the respondents as to why the Commission should not issue the proposed form related to the burden of filing and the requirement to update the previously filed data. Since the objections regarding burden related predominately to Schedule 506, which has been eliminated pursuant to Order No. 539-B, and since most of the remaining information is now filed with the Commission on other forms, the burden of submitting Form No. 108 prospectively is not judged to be an impediment to the promulgation of the form. There remains, however, the problems of the updating and whether small producers should be required to file.

The objecting parties contend that the Commission, rather than the producers, should undertake to update the previously filed data, which was completed through 1972. There are presently over 12,000 rate schedules on file with the Commission, of which approximately 7,300 are large producer pre-1972 rate schedules and 1,100 are large producer post-1972 rate schedules.

The Commission will undertake the burden of completing Form No. 108, as much as is possible from information presently on file, for all rate schedules currently on file with the Commission. In implementing the new system, and in order to reduce the potential filing burden on small producers, we will give all respondents who are eligible for small producer treatment but now maintain large producer rate schedules until December 31, 1976, to apply for small producer exemption. Since producers holding small producer certificates do not submit rate schedules to the Commission, small producers that take advantage of this grace period will not have to file Form 108; however, any producer that is eligible for small producer treatment but elects to retain its large producer rate schedule will be required to file the form.

Once the system is in operation, each year by December 31st the Commission will mail Schedules 501 and 505 to all respondents for completion and return by March 31st of the following year. Furthermore, effective as of January 1, 1977, any producer filing for a large producer certificate will also file Schedules 502, 503, and 504. Also as of that date all rate change filings formerly made on FPC Form No. 280 or pursuant to the form set out in Section 157.94(f) of the Commission's Regulations will be filed on Schedule 507 of Form No. 108.

For the initial reporting year, 1977, the Commission will, by December 15, 1976, mail all respondents the instructions, code books, and copies of the schedules to be used in future filings. By March 31, 1977, the Commission will transmit to all producers that complied with our August 1973 order in Docket No. R–478 a copy of the appropriate schedules of Form No. 108 filled out with the information currently on file with the Commission. By June 30, 1977, respondents will be required to verify the data on these schedules and complete any portions of Form No. 108 that request new information. All remaining rate schedules on file with the Commission will be transferred to the appropriate schedules of Form No. 108 for verification and completion by respondents during the upcoming year. The complete system would then be in operation by January 1, 1978. The Commission will also submit to the respondents Schedules 501 and 505, formerly Form Nos. 301–A and 301–B, as of January 1, 1977, to be completed per the instructions by March 31, 1977.

The Notice of Proposed Rulemaking stated that Form No. 108 should be submitted on magnetic tape. After reviewing the comments filed by the parties, we have determined that although this method would be extremely valuable to the Commission for administrative purposes, the problems involved outweigh the benefits. Therefore, we will not require filing on magnetic tape, but we do encourage producers to do so if possible. Instead, Commission personnel will undertake to computerize the forms as they are filed.

The only objection not dealt with above is the assertion that the Commission does not need information on pipeline-incurred gas treating and quality improvement costs to bring gas to pipeline quality. We will obtain such information from the pipelines' books and records when and as required. Therefore, treating costs will not be required. However, since the determination of gas quality standards is left to individual contract negotiations in the Commission's national rates,[3] it is important in our view to maintain records of the actual quality of gas being sold. Because of its specific reference to ratemaking and the general need to know the actual quality of gas being sold, the form will continue to require that these items be submitted.

The information to be submitted on the proposed form is necessary for the Commission to satisfy its regulatory responsibilities under the Natural Gas Act. In most instances we have revised our proposed form to reflect the comments of the respondents, when those amendments were in the public interest.

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[3] Opinion Nos. 699, *et al.*, 51 FPC 2212 (1974), *aff'd, Shell Oil Company* v. *Federal Power Commission*, 520 F. 2d 1061 (5th Cir. 1975), *cert. denied, sub nom., California Company, et al.* v. *F.P.C.*, Nos. 75–1289, *et al.; Opinion and Order Establishing Just and Reasonable Rates*, Opinion No. 749, Docket No. R–278, — FPC — (Dec. 31, 1975), *Interim Order Granting Rehearing for Purposes of Further Consideration, Revising Filing Requirements, Correcting Omissions, and Staying Refund Disbursements*, Opinion No. 749–A, Docket No. R–478, — FPC — (Feb. 27, 1976), *Order Granting Reconsideration and Modifying Opinion No. 749–A*, Opinion No. 749–B, Docket No. R–478, — FPC — (Mar. 31, 1976).

The remaining objections we have discussed and dealt with previously. Therefore, on the basis of the entire record in this proceeding, it is determined that Form No. 108, as modified herein, should be adopted.

The promulgation of this form will eliminate the need to comply with all or portions of the following Commission Regulations, which are herewith deleted or amended to conform to this order: (a) Section 154.94(f) and alternative FPC Form No. 280, (b) Section 154.91(b)(3), (c), Sections 157.24 and 250.5, (d) Section 260.5, and (e) Section 260.6.

Once operational, the Form No. 108 program will enable the Commission to perform rate impact studies on the following bases: (a) nationally, (b) by consuming area, (c) on a particular pipeline, (d) on a particular producer, (e) by contract date, (f) by contract type, (g) by production area or state. Other anticipated purposes include a detailed delineation of producer refund obligations on the same criteria as set out above, the ability to monitor changes in contract and gas quality conditions in contracts and the effect of those changes on consumers, and a decrease in the time required to process producer applications.

Several of the parties that filed comments on the proposed rulemaking requested a conference with the Staff to discuss the proposed form. Because of the elimination of Schedule 506 as it appeared in the Notice, the fact that the form collects information that is now being filed with the Commission on existing forms, and the modifications to the instructions and format made at the suggestion of the respondents, a conference would not serve any useful purpose. Therefore, the requests for a conference are denied.

Pursuant to the requirements of 44 U.S.C. Section 3512, Form No. 108 was submitted to the Comptroller General for clearance on August 19, 1976. By letter dated October 6, 1976, the Commission received conditional acceptance of the form. We have reviewed the comments of the General Accounting Office (GAO) and we have amended our procedures to conform thereto. Therefore, we now consider the GAO clearance to be unconditional.

The Commission finds:

(1) The notice and opportunity to participate in this proceeding with respect to the matter presently before the Commission through the submissions in writing are consistent and in accordance with all procedural requirements as prescribed in Section 553, Title 5 of the United States Code.

(2) The amendments to Part 260 of the Commission's Statements and Reports to add amended Section 260.6, to Part 154 of the Commission's Rate Schedules and Tariffs to add new subsection 154.92(e), and to Part 3 of the Commission's Organization; operation; information and requests; miscellaneous charges; ethical standards to substitute for the present Section 3.170(a)(17) a revised version are necessary and appropriate for the administration of the Natural Gas Act.

(3) Sections 154.94(f), 154.91(b)(3), 157.24, 250.5, and 260.5 shall be amended pursuant to the provisions of the instant order.

Senator FORD. Werner K. Hartenberger is the next witness, General Counsel of the Federal Communications Commission.

STATEMENT OF WERNER K. HARTENBERGER, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Mr. HARTENBERGER. Thank you for the opportunity to appear before this committee.

Because of a prior commitment, Chairman Wiley asked me to represent him before you today. I appreciate the opportunity to present these views on S. 263, the proposed Interim Regulatory Reform Act of 1977. I will submit my statement for the record and I will touch on those matters which are most important.

Senator FORD. Your statement will be included in the record in totality and I appreciate the brevity of your remarks.

Mr. HARTENBERGER. The first substantive provision affecting the Commission is section 3, which requires several specified regulatory

agencies to recodify their rules—in effect to modernize and simplify their rules—using detailed prescribed procedures. The Commission is wholeheartedly in support of the objective of this section and has been a leader in this area. In 1972, the Commission established a three-member task force to reexamine our broadcast rules to determine whether each rule was still necessary to serve the public interest in view of changes in technology and, if so, to modernize and simplify the rule. Since the initiation of this continuing project, we have modified or deleted nearly 500 broadcast rules. Because of the success of this program, we have extended it to our common carrier and cable television rules, notwithstanding the fact that the latter rules are relatively new, having been adopted in 1972.

Although the Commission approves of the purpose of section 3, we recommend against the procedures proposed in that section because we believe that they are too cumbersome. Initially, we believe the 360-day period for the Commission to develop a recodification of all rules is overly optimistic if the job is to be done right.

While we recognize that there is probably a wide variation in the number and types of rules among agencies, many of our rules are highly technical. The kind of thorough restudy contemplated under section 3 simply could not be done properly in a year. As noted, we have been rewriting our broadcast rules for the last 5 years and we have not yet completed the task.

Furthermore, 120 days for the Administrative Conference to review the rules of seven agencies appears unrealistic. It is also unclear what task the Administrative Conference would be expected to perform. If we were dealing only with procedural rules, the Conference could well have a worthwhile role—but we question whether the Conference possesses the necessary expertise to analyze the substance of, or need for, highly technical rules such as exist in the field of communications. The additional 90 days then allowed the regulatory agency to evaluate any recommendations and comments, and to conduct additional study, is also too brief a period of time.

In our view, it would be preferable for the bill simply to direct each agency to simplify and modernize its rules within a fixed period, such as 2 years, and then to submit a report to the appropriate committe exercising oversight over its activities.

Section 4(b) of S. 263 would require the Commission to undertake a revision of the laws applicable to communications—codified in title 47 of the U.S. Code, not title 46.

This provision, which appeared in last year's bill, has been mooted in large part by subsequent development. The House Communications Subcommittee has recently initiated what is characterized as a "basement-to-attic" reexamination and rewrite of the Communications Act of 1934.

The Senate Communications Subcommittee is currently involved in an ambitious set of hearings on major communications matters. The Commission, to the extent requested and consistent with our staff resources, will assist in these efforts. We recommend, therefore, the deletion of section 4(b).

Section 5(b) of the bill would require the Commission to grant or deny petitions for rulemaking within 120 days after receipt.

The Commission is sympathetic to the objective of this provision and has been attempting to expedite all of its procedures. Last year, we completed substantial reform to make our adjudicatory procedures more efficient and have recently given the staff administrative deadlines for rulemaking matters.

These deadlines are in line with the one proposed in the bill, and we do not believe that we would have serious problems in meeting it. A firm statutory deadline, however, lacks flexibility to meet differing conditions among the agencies or different types of problems within an agency.

The Commission opposes the provision in section 5 that would transfer jurisdiction from the courts of appeals to the district courts to review Commission orders denying petitions for rulemaking. Section 402(a) of the Communications Act now stipulates that any proceeding to enjoin, set aside, annul, or suspend any order of the Commission shall be brought as provided by Public Law 901, 81st Congress. This law confers exclusive jurisdiction on the courts of appeals over all final orders of the Federal Communications Commission made reviewable by section 402(a).

We believe that the courts of appeals should retain this jurisdiction because over the years they have developed considerable understanding of communications law, and agency rules, regulations, and procedures. Consequently, they are in a far better position than the district courts to resolve expeditiously issues involving the Commission.

Section 6(b) of the bill would add a new provision to the Communications Act of 1934 to require three things; namely, (1) budget estimates submitted by the Commission to the President or the OMB must be concurrently transmitted to the Congress; (2) legislative recommendations, testimony, or comments on legislation to the President or OMB must be concurrently transmitted to the Congress; and (3) written requests for documents from a congressional committee which has responsibility for the authorization of appropriations for the Commission must be complied with in 10 days if the documents are in our possession or under our control.

While we have no particular objection to current budgetary practices, we will be pleased to submit our budget requests in whatever manner will best serve the needs of Congress.

With respect to the provision that written requests for documents from a congressional committee which has responsibility for authorizing appropriations for the Commission be complied with in 10 days, it is, of course, the policy of the Commission to cooperate in every way with the Congress in keeping it apprised of our functions and activities.

However, to the extent that the proposed language may be construed to broaden an agency's obligation to furnish information to Congress, it should be noted that we have on occasion had to delay access to records pertaining to a case in an adjudicatory posture to avoid prejudice to the rights of participants and to protect the integrity of the quasi-judicial process.

Of course, we readily make such records available to the Congress upon the completion of an adjudicatory proceeding. Some

clarification of the intent of section 6(b) in this regard would be helpful. Any such clarification might also make explicit that information furnished to the Congress and exempt from public disclosure will remain nonpublic and be treated in a confidential manner.

Section 7(a) of S. 263 deals with representation in civil actions. It would provide that when the Commission gives advance notice regarding litigation to the Attorney General, and the Attorney General then does not commence, defend, or intervene in the litigation within 45 days, the Commission may do so in its own name and through its own attorneys.

The Commission is in accord with this provision because it would lessen our dependence on the Department of Justice and the various U.S. attorneys in suits to collect monetary forfeitures under the Communications Act, and to compel compliance with the act or Commission rules.

Section 8 of the bill amends section 1114 of title 18 of the U.S. Code. That provision makes it a Federal criminal offense to kill, assault ,or intimidate most Federal law enforcement officials, and the proposed legislation would extend title 18's protective coverage to Commission employees engaged in investigative, inspection, or law enforcement functions.

The lack of such protection has, on a number of occasions, exposed Commission personnel to serious physical danger. The Commission has sought such legislation for a number of years and we are particularly pleased to support this provision.

Section 9(b) of S. 263 would amend the Communications Act of 1934 concerning conflicts of interest. It would prohibit any Commissioner appointed after the bill's enactment from representing any person before the Commission in a professional capacity for 2 years termination of service as a Commissioner. At the same time, it removes from the Communications Act the 1-year bar against a Commissioner representing anyone before the Commission if he fails to complete the term to which appointed.

Absent some demonstrated need for extending the provision from 1 year to 2, we believe that the present proscription contained in section 4(b) of the Communications Act is adequate when considered in conjunction with other similar legal prohibitions.

Title 18 U.S.C. 207 prohibits former employees of the executive branch and of independent agencies of the United States from acting for an indefinite period of time as agent or attorney for any party in any matter in which they participated personally and substantially while an employee.

It further prohibits personal appearances by former employees before any court or agency for a period of 1 year after termination of their employment in connection with any matter which was under their official responsibility as employees of the Government.

In addition, canon 9–3 of the American Bar Association's canons of ethics, and disciplinary rule 9–101B of the ABA's code of professional responsibility, prohibit lawyers from accepting private employment in connection with any matter in which they had substantial responsibility while employed by the Government. We believe these restrictions are adequate and effective aids in avoiding actual and potential conflicts of interest.

Section 10(b) of S. 263 would add a new subsection to section 4 of the Communications Act to permit a civil action on a claim against the United States based on misrepresentation or deceit, or the exercise or failure to exercise a discretionary function by the Commission or a Commission employee not involving "agency action."

I understand this provision is based upon a similar requirement in the Consumer Product Safety Commission Improvements Act of 1976. Whatever may have been the need for it in that act, there has been no evidence of any need for such a law applicable to the FCC. It is unclear what effect, if any, it would have upon this agency.

Section 11(b) would amend section 4(a) of the Communications Act to provide that a chairman shall be appointed by the President for 3 years with the advice and consent of the Senate. The present law states that the Commission shall be composed of seven Commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the president shall designate as chairman.

Whenever the President nominates a person as a Commissioner, this committee holds a confirmation hearing on that nomination and the full Senate votes on the appointment.

The same practice is followed where the President appoints a Commissioner and at the same time designates the commissioner as chairman. However, when a Commissioner who has already been appointed and confirmed is designated as chairman, no additional confirmation need take place.

The existing system has been completely satisfactory from the Commission's point of view. The questions of confirmation of the chairman and the relative freedom a President should have in selecting a new one are essentially policy matters for the Congress. I see no particular problem with respect to requiring Senate confirmation. I'm not certain, however, whether the 3-year term for chairman, while retaining a 7-year term for Commissioners, is a benefit or a detriment.

In the light of congressional and administration insistence that appointees commit themselves to serve a full term, the committee may wish to consider to what extent the more frequent appointment of a chairman might be inconsistent with the increasing congressional emphasis on maintaining the regulatory agency's independence from the executive.

The last section of S. 263 that applies to the FCC is section 12(a). This section would authorize appropriations for the Commission for 3 fiscal years.

We have two comments regarding this section. First: The amounts that would be authorized are significantly less than our anticipated requirements.

Second: The FCC currently operates under an indefinite authorization so that no yearly limit is placed on the amount of funds that the Congress may appropriate. We have found this procedure to be completely satisfactory. An open-ended authorization allows both the Commission and the Congress greater flexibility while in no way restricting the congressional oversight and budgetary review process.

This concludes my prepared statement, Mr. Chairman. I would be pleased to respond to any questions.

Senator FORD. Thank you very much. I notice that although you find the rules recodification procedure cumbersome, you're engaging in this activity right now even with the rules that were issued as recently as 1972. Other agencies will testify against this provision. One in particular says that many of its rules were issued in 1967. Do you believe that reviewing rules as recently as 5 years after promulgation is an unworthy task?

Mr. HARTENBERGER. We believe it's a worthy task. We may be different than the other agencies, however. Changes in technology which occur on a day-to-day basis require a new look at our rules on a day-by-day basis. The cable television industry is one example of that changing technology. The Commission rules were adopted in 1972 and we have recognized a continuing need to reevaluate those rules and make changes. The Commission has amended its rules accordingly and established task forces to do that.

Senator FORD. It seems to me that you are administering an act that was approved before television and before cable TV and there is an urgent need maybe to revise the 1938 Communications Act. Would you say that is true?

Mr. HARTENBERGER. There has been an expressed need by the Congress and Commission to make precisely that type of change. When the Congress revised the Communications Act back in 1934, it created, I think, an excellent piece of legislation. It drafted broad statutory requirements to determine whether service would be in the public interest and it gave the Commission flexibility to interpret that statute. As you indicated so well a great deal has happened since that time. It might be good to look at various portions of the statute. For that reason, the House Subcommittee on Communications has undertaken a major rewrite of the act and the Senate subcommittee has taken under review a major rewrite of these matters.

The Commission has submitted legislation where it believed it would be prudent to make alterations to serve the public interest.

Senator FORD. What responsibility have you assigned to this project on a formal basis, the law revision project?

Mr. HARTENBERGER. To the extent we are asked to contribute, we will be happy to do so and we would expect to take a full and active role if we are asked to do so.

The House subcommittee has drafted proposals and categorized various portions of the act among the staff members and has not yet approached the position or posture where they could profitably look to the FCC for help. We are awaiting that kind of invitation and we will be glad to lend our expertise and assistance.

Senator FORD. Are you concerned with the rewrite?

Mr. HARTENBERGER. In what respect?

Senator FORD. They are trying to rewrite the Communications Act. Are you concerned about the possibility of a rewrite?

Mr. HARTENBERGER. No, sir, we are not concerned at all. We think, as indicated, there are a good many provisions of the Communications Act, which are, we think, in need of rewrite. My own personal evaluation is that I'm not certain the entire act needs to be rewritten.

Senator FORD. That is what I mean.

Mr. HARTENBERGER. There is an old phrase that we have to be careful not to throw out the baby with the bath water. I think the Congress performed a sound public service when they drafted the Communications Act as they did. But I would be the first to agree there needs to be important measures taken with respect to the rewrite. The strength of the act rests on its history of the past 40 years. It has served the Congress, public, and the Commission well over those 40 years in most respects.

Senator FORD. You support the representation and civil action provisions as they apply to the FCC. The FPC and the FMC already have some of this authority and oppose the provision.

Recognizing that you are not an energy lawyer or maritime lawyer, could you do this for us: review the statutory provisions of the FPC and FMC, which already permit those agencies to go into court on their own behalf and analyze the differences between existing law and the provisions of the S. 263 on this matter? I ask this of you since you are the only general counsel up here today other than Mr. Norton and his agency already has that authority.

Mr. HARTENBERGER. I would be happy to do that, Mr. Chairman.[1]

Senator FORD. One quick question and I will turn it over to Senator Schmitt. You have 3-year relicensing of all broadcasting facilities?

Mr. HARTENBERGER. Yes, sir.

Senator FORD. And there is a desire on their part to extend that to 5 years. Do you have any problem to the 5-year relicensing procedure?

Mr. HARTENBERGER. No, sir, the commission, as you indicated, under the Communications Act periodically reviews the public stewardship of broadcast licensees on a 3-year basis. We have no objection to that being extended to 5 years. The Commission recognizes that with roughly 8,000 broadcast licensees, it is impossible for it to review each licensee's performance on an annual basis. For that reason it staggers the licenses. On a 5-year scheme we would be able to give more careful review to each licensee.

We have no reason to believe that a 5-year period would in any way handicap the agency's opportunity to evaluate performance.

Senator FORD. You could give greater personal attention. Instead of one-third each year you would have 20 percent to consider.

Mr. HARTENBERGER. Yes, sir.

Senator FORD. Let me pitch out another one, trying to relieve your responsibility and cut down on the notice, could you be in a position or would it be advantageous if an agency submits a license for renewal and there has been no objections to that licensee there have been no complaints about it, it seems to be a clean one and their papers and documents are in order, could you renew those automatically and get into those that are presenting problems or creating problems and still give you more time to do maybe a more detailed job. Is that asking too much or going too far?

Mr. HARTENBERGER. It would be going too far under the present Communications Act.

Senator FORD. Let's plow new ground.

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[1] See p. 186.

Mr. HARTENBERGER. If the Congress is plowing new ground, as I understand your suggestion, it would direct attention to those licensees that warrant close scrutiny. I think the public interest would be better served by doing that.

Senator FORD. How much time is taken by the Commission when it looks at a drop in station?

Mr. HARTENBERGER. Drop in?

Senator FORD. Don't you call them "drop ins"?

Mr. HARTENBERGER. Yes, sir.

Senator FORD. Don't you call it a "drop in," another station that is in between two stations?

You put one in there and it gets out to both territories. I don't know anything about it. Let me say I went down in the southern part of Kentucky during one of my recent trips and an area which should receive good communications from a station in Kentucky. Along the border I understand there may be consideration for a "drop in" station in Tennessee that would further create deterioration. I have had no complaints about it but I trotted up on it. Local people are concerned about the transmission. I'm putting a case up to you. It is something I ran into and I would like comment on it.

Mr. HARTENBERGER. Your unfamiliarity with the situation is probably no greater than mine. The engineers confuse us easily. As you indicated quite properly, the Commission allocates channels across the country and tries to make certain that these coverage circles don't interfere with each other.

To the degree where it can allocate other channels in an area without interfering with the service characteristics of those stations that are there, it would accomplish a public interest objective by adding services to a given market.

As to the difficulty of doing that, however, I should note that the Commission has allocated these channels over the past 40-odd years and there are relatively few that could, in fact, be "dropped in."

The Commission has recognized that it may indeed be a feasible proposal in a handful of markets. For that reason it recently issued a notice of inquiry to look into that point; where those channels can be "dropped in" without materially degrading the service characteristics of existing licensees, it would satisfy the public interest requirements to drop in that channel.

The Commission, after its brief review by the staff, is led to believe that there may be only a relative handful of situations where that might be accomplished.

Senator FORD. Is the *Tennessee* case one of them?

Mr. HARTENBERGER. That is one of those being considered.

Senator FORD. Strange how you run into things when you don't know anything about it at all.

I have no other questions.

Senator SCHMITT. We have to move along. I would like your submission for the record,[2] a brief explanation as to why your revision of the broadcast rules is taking 5 years. I would like somebody to write a 1-page explanation as to why it takes 5 years. That is what we are examining here, why it takes so long to review existing rules and regulations.

[2] See p. 187.

I also think that in the revision of the Communications Act of 1934, that you would probably agree that we don't want to get so specific that we cause difficulties for the Commission.

One of the beauties of the Communications Act has been that it was general enough that it defined the characteristics of the national communication system of that time and for some decades subsequently and that the time has almost certainly come to redefine that communication system because of the advances of technology.

If we become so specific as to seriously tie the hands of the Commission in interpreting that system and future changes in it, then we probably have done a disservice, rather than a service.

Mr. HARTENBERGER. I agree completely with that statement, sir.

Senator SCHMITT. Thank you very much for your testimony.

[The statement follows:]

STATEMENT OF WERNER K. HARTENBERGER, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

MR. CHAIRMAN AND MEMBERS OF TNE COMMITTEE: I am Werner K. Hartenberger, General Counsel of the Federal Communications Commission. Because of a prior commitment, Chairman Wiley asked me to represent the Commission before you today. The Commission appreciates the opportunity to present its views on S. 263, the proposed "Interim Regulatory Reform Act of 1977." As stated by Senator Pearson when he introduced the bill on January 14, the purpose of the proposed legislation is to achieve "structural and operational improvements" at seven regulatory agencies including the Commission. To accomplish this purpose, the bill embodies a wide variety of provisions on which I will comment individually.

The first substantive provision affecting the Commission is section 3, which requires several specified regulatory agencies to recodify their rules—in effect to modernize and simplify their rules—using detailed prescribed procedures. The Commission is wholeheartedly in support of the objective of this section and has been a leader in this area. In 1972, the Commission established a three-member task force to re-examine our broadcast rules to determine whether each rule was still necessary to serve the public interest in view of changes in technology and, if so, to modernize and simplify the rule. Since the initiation of this continuing project, we have modified or deleted nearly 500 broadcast rules. Because of the success of this program, we have extended it to our common carrier and cable television rules, notwithstanding the fact that the latter rules are relaatively new, having been adopted in 1972.

Although the Commission approves of the purpose of section 3, we recommend against the procedures proposed in that section because we believe that they are too cumbersome. Initially, we believe the 360-day period for the Commission to develop a recodification of all rules is overly optimistic if the job is to be done right. While we recognize that there is probably a wide variation in the number and types of rules among the agencies, many of our rules are highly technical. The kind of thorough restudy contemplated unde rsection 3 simply could not be done properly in a year. As noted, we have been rewriting our broadcast rules for the last five years and we have not yet completed the task.

Furthermore, one hundred and twenty days for the Administrative Conference to review the rules of seven agencies appears unrealistic. It is also unclear what task the Administrative Conference would be expected to perform. If we were dealing only with procedural rules, the Conference could well have a worthwhile role—but we question whether the Conference possesses the necessary expertise to analyze the substance of, or need for, highly technical rules such as exist in the field of communications. The additional 90 days then allowed the regulatory agency to evaluate any recommendations and comments, and to conduct additional study, is also too brief a period of time.

It is also our opinion that the preparation of explanatory statements could conceivably be more time-consuming than the rewriting of the rules themselves,

and would greatly add to the paperwork burden at the Commission. We believe, therefore, that this requirement would be counterproductive.

In our view, it would be perferable for the bill simply to direct each agency to simplify and modernize its rules within a fixed period, such as two years, and then to submit a report to the appropriate committee exercising oversight over its activities. Once the major one-time overhaul is completed, continuing attention could be given to the problem through the oversight process.

Section 4(b) of S. 263 would require the Commission to undertake a revision of the laws applicable to communications (codified in Title 47 of the United States Code, not Title 46). This provision, which appeared in last year's bill, has been mooted in large part by subsequent developments. The House Communications Subcommittee has recently initiated what it characterized as a "basement-to-attic" reexamination and rewrite of the Communications Act of 1934. The Senate Communications Subcommittee is currently involved in an ambitious set of hearings on major communicatioss matters. The Commission, to the extent requested and consistent with our staff resources, will assist in these efforts. We recommend, therefore, the deletion of section 4(b). If it were to be adopted, we would note the need for additional personnel and the unrealistically brief time frame of six months for a preliminary report and two years for a final report.

Section 5(b) of the bill would require the Commission to grant or deny petitions for rulemaking within 120 days after receipt. The section makes clear that "granting" the petition simply means commencing appropriate rulemaking. If the Commission denies a petition, or fails to act within the 120-day period, the petitioner may commence a civil action in an appropriate U.S. district court for an order directing the Commission to intiate a proceeding to take the action requested in the petition.

The Commission is sympathetic to the objective of this provision and has been attempting to expedite all of its procedures. Last year, we completed substantial reform to make our adjudicatory procedures more efficient and have recently given the staff administrative deadlines for rulemaking matters. These deadlines are in line with the one proposed in the bill, and we do not believe that we would have serious problems in meeting it. A firm statutory deadline, however, lacks flexibility to meet differing conditions among the agencies or different types of problems within an agency. Should the Congress, nevertheless, adopt such a provision, it would more appropriately fit as a new section 417 of the Communications Act rather than section 406.

The Commission opposes the provision in section 5 that would transfer jurisdiction from the courts of appeals to the district courts to review Commission orders denying petitions for rulemaking. Section 402(a) of the Communications Act now stipulates that any proceeding to enjoin, set aside, annul, or suspend any order of the Commission shall be brought as provided by Public Law 901, 81st Congress, approved December 29, 1960 (now 28 U.S.C. 2341). This law confers exclusive jurisdiction on the courts of appeals over all final orders of the Federal Communications Commission made reviewable by section 402(a). We believe that the courts of appeals should retain this jurisdiction because over the years they have developed considerable understanding of communications law, and agency rules, regulations and procedures. Consequently, they are in a far better position than the districts courts to resolve expeditiously issues involving the Commission.

Section 6(b) of the bill would add a new provision to the Communications Act of 1934 to require three things: namely, (1) budget estimates submitted by the Commission to the President or the Office of Management and Budget must be concurrently transmitted to the Congress; (2) legislative recommendations, testimony, or comments on legislation to the President or OMB must be concurrently transmitted to the Congress; and (3) written requests for documents from a congressional committee which has responsibility for the authorization of appropriations for the Commission must be complied with in ten days if the documents are in our possession or under our control.

While we have no particular objection to current budgetary practices, we will be pleased to submit our budget requests in whatever manner will best serve the needs of Congress.

The purpose of legislative recommendations, testimony and comments is to make our views known and to aid Congress and its committees in the legislative process. The Commission, therefore, will be pleased to make these recommen-

dations, testimony and comments available as proposed. In this respect, we would like to suggest a change in the wording of the second sentence in proposed paragraph (2) which now reads, "No officer or agency of the United States shall have any authority to require the Commission to submit its legislative recommendations, testimony or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony or comments to the Congress." No legal requirement for any such approval or review now exists. To avoid any possible implication that the language confers some authority which does not presently exist, we suggest the deletion of the phrase "prior to the submission of such recommendations, testimony, or comments to the Congress," and replacing it with the following: "but the Commission may supply the Office of Management and Budget or others information copies at the time such material is submitted to the Congress."

With respect to the provision that written requests for documents from a congressional committee which has responsibility for authorizing appropriations for the Commission be complied with in 10 days, it is, of course, the policy of the Commission to cooperate in every way with the Congress in keeping it apprised of our functions and activities. However, to the extent that the proposed language may be construed to broaden an agency's obligation to furnish information to Congress, it should be noted that we have on occasion had to delay access to records pertaining to a case in an adjudicatory posture to avoid prejudice to the rights of participants and to protect the integrity of the quasi-judicial process. Of course, we readily make such records available to the Congress upon the completion of an adjudicatory proceeding. Some clarification of the intent of section 6(b) in this regard would be helpful. Any such clarification might also make explicit that information furnished to the Congress and exempt from public disclosure will remain non-public and be treated in a confidential manner.

Section 7(a) of S. 263 deals with representation in civil actions. It would provide that when the Commission gives advance notice regarding litigation to the Attorney General, and the Attorney General then does not commence, defend or intervene in the litigation within 45 days, the Commission may do so in its own name and through its own attorneys. The Commission is in accord with this provision because it would lessen our dependence on the Department of Justice and the various United States Attorneys in suits to collect monetary forfeitures under the Communications Act, and to compel compliance with the Act or Commission rules.

Moreover, under present law, civil actions must be prosecuted by U.S. Attorneys who are struggling under a staggering caseload in both the criminal and civil dockets. The proposed provision would relieve the U.S. Attorneys of some of this burden, while allowing the Commission to increase the effectiveness of its enforcement program through swift action in the U.S. district courts. This change would be particularly salutary in the enforcement of the Citizens Band radio rules.

We anticipate that the implementation of section 7 would have some limited budgetary impact on the Commission due to increased demands on the legal staff and greater travel expenses. If the need for additional funds is substantial, a supplemental budget request may be necessary.

Section 8 of the bill amends section 1114 of Title 18 of the U.S. Code. That provision makes it a Federal criminal offense to kill, assault or intimidate most Federal law enforcement officials, and the proposed legislation would extend Title 18's protective coverage to Commission employees engaged in investigative, inspection or law enforcement functions. The lack of such protection has, on a number of occasions, exposed Commission personnel to serious physical danger. The Commission has sought such legislation for a number of years and we are particularly pleased to support this provision.

Section 9(b) of S. 263 would amend the Communications Act of 1934 concerning conflicts of interest. It would prohibit any commissioner appointed after the bill's enactment from representing any person before the Commission in a professional capacity for two years after termination of service as a commissioner. At the same time, it removes from the Communications Act the one year bar against a commissioner representing anyone before the Commission if he fails to complete the term to which appointed.

Absent some demonstrated need for extending the provision from one year to two, we believe that the present proscription contained in section 4(b) of the Communications Act is adequate when considered in conjunction with other similar legal prohibitions. Title 18 U.S.C. 207 prohibits former employees of the executive branch and of independent agencies of the United States from acting for an indefinite period of time as agent or attorney for any party in any matter in which they participated personally and substantially while an employee. It further prohibits personal appearances by former employees before any court or agency for a period of one year after termination of their employment in connection with any matter which was under their official responsibility as employees of the Government. In addition, Canon 9–3 of the American Bar Association's Canons of Ethics, and Disciplinary Rule 9–101B of the ABA's Code of Professional Responsibility, prohibit lawyers from accepting private employment in connection with any matter in which they had substantial responsibility while employed by the Government. We believe these restrictions are adequate and effective aids in avoiding actual and potential conflicts of interest.

Section 10(b) of S. 263 would add a new subsection to section 4 of the Communications Act to permit a civil action on a claim against the United States based on misrepresentation or deceit, or the exercise or failure to exercise a discretionary function by the Commission or a Commission employee not involving "agency action."

I understand this provision is based upon a similar requirement in the Consumer Product Safety Commission Improvements Act of 1976. Whatever may have been the need for it in that Act, there has been no evidence of any need for such a law applicable to the FCC. It is unclear what effect, if any, it would have upon this agency. In the absence of some demonstrated need, however, other than the desire for uniformity, I would be reluctant to open the door to unknown potential litigation—even though the provision self-destructs on January 1, 1979. As to the question of sovereign immunity, we are not expert and would defer to the Department of Justice on this point.

Section 11(b) would amend section 4(a) of the Communications Act to provide that a chairman shall be appointed by the President for three years with the advice and consent of the Senate. The present law states that the Commission shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman. Whenever the President nominates a person as a commissioner, this Committee holds a confirmation hearing on that nomination and the full Senate votes on the appointment. The same practice is followed where the President appoints a commissioner and at the same time designates that commissioner as chairman. However, when a commissioner who has already been appointed and confirmed is designated as chairman, no additional confirmation need take place.

The existing system has been completely satisfactory from the Commission's point of view. The questions of confirmation of the chairman and the relative freedom a President should have in selecting a new one are essentially policy matters for the Congress. I see no particular problem with respect to requiring Senate confirmation. I'm not certain, however, whether the three year term for chairman, while retaining a seven year term for commissioners, is a benefit or a detriment. In the light of congressional and Administration insistence that appointees commit themselves to serve a full term, the Committee may wish to consider to what extent the more frequent appointment of a chairman might be inconsistent with the increasing congressional emphasis on maintaining the regulatory agency's independence from the Executive.

The last section of S. 263 that applies to the FCC is section 12(a). This section would authorize appropriations for the Commission for three fiscal years. I would note that its reference to 4(c) should be changed to subsection 4(p).

We have two comments regarding this section. First, the amounts that would be authorized are significantly less than our anticipated requirements. For example, for fiscal year 1978, the bill authorizes less than $58 million whereas we anticipate that our requirements will approach $70 million. I would note our current appropriations request is for $2.1 million more than the proposed FY 1978 authorization. We will be proposing amendments, which, if approved, would increase our FY 1978 appropriation to $69 million. The other authorizations in the bill are also below agency needs in that $60 and $63 million would

be authorized for 1979 and 1980, while we anticipate the need for roughly $74 and $78 million for the same years.

Secondly, the FCC currently operates under an indefinite authorization so that no yearly limit is placed on the amount of funds that the Congress may appropriate. We have found this procedure to be completely satisfactory. An open-ended authorization allows both the Commission and the Congress greater flexibility while in no way restricting the Congressional oversight and budgetary review process.

This concludes my prepared statement, Mr. Chairman, I would be please to respond to any questions.

[The following information was referred to on p. 180.]

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., April 20, 1977.

Hon. WENDALL H. FORD,
U.S. Senate,
Washington, D.C.

DEAR SENATOR FORD: During the course of the April 4 hearings held by the Senate Committee on Commerce, Science and Transportation on S. 263, the "Interim Regulatory Reform Act of 1977," you asked me to review the statutory provisions of the Federal Power Commission and the Federal Maritime Commission concerning their respective authority to pursue their own civil matters in the courts. Specifically, you requested an analysis of the differences between existing law and the provision of S. 263 on this matter.

Initially, it is our understanding that the Federal Power Commission relies on the following provision of its Act (16 U.S.C. § 825m) for authority to pursue civil litigation on its own behalf.

§ 825m. Restraining violations; mandamus to compel compliance with law; employment of attorneys.

(a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provision of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States, the United States District Court for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

The Federal Maritime Commission presumably bases its authority on Title 46 U.S.C. § 282 which reads as follows:

§ 828. Enforcement of orders of Commission.

In case of violation of any order of the Federal Maritime Commission other than an order for the payment of money, the Commission, or any party injured by such violation, or the Attorney General, may apply to a district court having jurisdiction of the parties; and if, after hearing, the court determines that the order was regularly made and duly issued, it shall enforce obedience thereto by a writ of injunction or other proper process, mandatory or otherwise.

Section 7 of S. 263 would require both the FPC and FMC to give written advance notice and consult with the Attorney General with respect to their intention to commence any court action. If the Attorney General fails to act within 45 days after being notified, the agencies are authorized to act in their own name. S. 263 also provides that notwithstanding the notice provisions, these agencies may seek temporary or preliminary injunctive relief or initiate an action subject to being preempted by the Attorney General within the 45 day notice period.

The FPC and FMC statutes set out above can be distinguished from S. 263 in that there is no present requirement for prior consultation with the Attorney General or authorization for the Attorney General to preempt or exclude these two agencies from conducting civil litigation on their own behalf. Thus, S. 263 would, in effect, reduce the control of the FPC and the FMC over their respec-

tive civil litigation process by interposing a 45 day period after advance notice regarding litigation to the Attorney General, coupled with a failure to act by the Attorney General, before those agencies could proceed on their own as they are apparently authorized to do under existing statutes. Conceivably, then, the Power and Maritime Commissions' present practice of representing themselves in District Court proceedings may be largely, if not, wholly circumscribed by the opportunity afforded to the Attorney General to intervene and preempt these agencies' representation on their own behalf within the statutorily prescribed 45-day period of S. 263.

If we may be of further assistance in this matter, please let me know.

Sincerely,

WERNER K. HARTENBERGER,
General Counsel.

[The following information was referred to on p. 181.]

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., April 20, 1977.

Hon. HARRISON D. SCHMITT,
U.S. Senate,
Washington, D.C.

DEAR SENATOR SCHMITT: During the course of the April 4 hearings held by the Senate Committee on Commerce, Science and Transportation, you requested a brief explanation as to why our revision of the broadcast rules has taken five years.

In 1972, the Commission instituted a study of its rules and regulations under the supervision of Commissioner Richard E. Wiley with a task force composed of an attorney, an engineer and a broadcast specialist. In its Public Notice of April 6, 1972, instituting the broadcast re-regulation study, it was pointed out that the study would be "limited only by the availability of manpower and other resources."

The Task Force reviewed each and every rule in Parts 73 and 74 of our Rules and Regulations, as well as general major policy matters, made the initial studies, prepared Notices of Inquiry or Proposed Rule Making, analysed the comments and reply comments received, and prepared the Reports and Orders for Commission consideration. During the course of the review, and pursuant to the provisions of the Administrative Procedure Act and the Judicial Review Act, a number of Notices of Inquiry and Proposed Rule Making were issued and public comments invited. Over 600 comments were received and evaluated by the Task Force.

Over the course of those five years, 16 separate re-regulation orders were prepared and adopted by the Commission. In addition, the Task Force, among other matters, undertook consideration of several lengthy proceedings going beyond the broadcast rules including ascertainment guidelines for broadcast license renewals, the use of automatic transmission systems by broadcast staitons, and a new shorter radio license renewal application form.

With respect to the nearly 500 changes in Commission rules and regulations on broadcasting, it should be pointed out that many of the proceedings were extremely complicated, far reaching in scope and necessarily time-consuming. The comments received were of a highly specialized, technical and procedural nature.

We are enclosing for your information a summary of Actions resulting from the Commission's study on Reregulation of Broadcasting.[1] As you can see from the summary, this is truly a comprehensive program of regulatory revision.

Should you desire further information, please let me know.

Sincerely,

WERNER K. HARTENBERGER,
General Counsel.

Enclosure.

Senator SCHMITT. The next witness is the Honorable John Robson, Chairman of the Civil Aeronautics Board (CAB).

We are running short of time and I hope you will summarize and questions will be submitted for the record based on your testimony.

[1] The material is in the subcommittee files.

STATEMENT OF HON. JOHN E. ROBSON, CHAIRMAN, CIVIL AERONAUTICS BOARD

Mr. ROBSON. Senator Schmitt, would you prefer that I try to summarize our statement? It is not long, and I would be happy to read it.

Senator SCHMITT. If you can summarize in less time than reading it, I would appreciate that.

Mr. ROBSON. I will give it a whirl.

First, I think we should make clear that the CAB is in agreement with the underlying philosophy and direction of the bill.

We have for the last 2 or 3 years, been deeply involved in an examination of our current statutory authority and developing recommendations on basic revisions of the Federal Aviation Act, which is our governing law.

We have had significant hearings in the Senate and, indeed, at the moment the Aviation Subcommittee of this commitee is conducting hearings on basic regulatory reform.

The CAB has recommended fundamental regulatory reform and a revision of our law which is before that committee.

So that in terms of considering our law and the functions of our agency, it is fair to say that a great deal more has happened with respect to the CAB than has happened with respect to the other agencies.

I'm hopeful that we get a regulatory reform bill this year. It will be one that touches not only some of the concerns that are raised in S. 263, but which really goes far beyond it and addresses the fundamentals of what the CAB is doing and the degree of Federal aviation regulation which should be continued.

So our point on the basic features of S. 263 is really that we are further along than S. 263 perhaps contemplated and that to the extent that there are specific provisions in S. 263 which can be useful, in an overall revision of the statute, we suggest that they be brought to the attention of the Subcommittee on Aviation, and be incorporated in a regulatory reform bill of a more comprehensive nature which I hope emerges from Congress in the not too distant future.

With respect to some of the specifics in S. 263, first, insofar as revision of the statute and rules, we would expect that the regulatory reform bill would accomplish a dramatic revision of our bill and consequently of the rules under which the Board operates.

We would have no objection to the incorporation of a recodification provision into a regulatory reform bill, as long as we have the time and resources which this committee has recognized are necessary for such an undertaking. They should be provided.

We have supported procedural reform. We have supported the deadline concept. We have done a good deal at the agency to move that idea along. We have great reluctance in fixing statutorially a particular date on which something will happen. Our approach has been to require the agency to fix the deadlines by rule and stick by them. Indeed, we would be directed to do so by Congress.

Insofar as appropriations go, I suspect we find ourselves in substantially the same position as other agencies. First the imposition of the ceilings contemplated in S. 263 we don't think are necessary

and second, they don't recognize the transitional needs that an agency like ours would have if regulatory reform passed. We believe that the annual appropriations concept which we have gone through with the rest of the world has worked pretty well and, indeed, I think I can say on behalf of the Board that we have been a pretty frugal agency in terms of staff increment over the years.

As far as tenure and conflicts of interest, the question as to Congress' confirmation specifically for the position of Chairman and for a fixed term, we believe really is a matter in the final analysis between the two branches of Government which are involved: that is, the legislative and executive branches. I think it really deals with the question of the involvement of Congress or the President in that process. I would say that I don't think that the process we have had at the Board has been one that has generated any substantial problems in the past. But in the final analysis I think it really is a balance between Congress and the executive branch. Insofar as conflicts of interest go, we have been in a substantial review of that issue ourselves. We are examining the questions of pre- and post-employment limitations which would extend not only to members of the Board, but to staff.

The Carter administration has promised some legislation or executive action in that area. Perhaps it is an issue that ought to be dealt with more broadly than the more limited approach that S. 263 takes, which is to really focus on the time before which a former Commissioner could appear before his or her agency.

As we read the bill, it is one that would extend the present 1-year limitation.

Under our own rules at present we construe that 1-year limitation as extending to anything that was pending before the Board during that Commissioner's tenure, but not to matters which arise after a person has left.

Insofar as OMB clearance, our feeling is that we would have no objection to the provision. But, in all candor, I don't think it has been much of a problem in the past. I think Congress has been very able to get any information from the agency with respect to its budget or legislative matters. In fact, in almost every appropriations hearing we have, the first question is what did you ask OMB for and what did you get. It is not a significant practical problem. In fact, the OMB clearance process sometimes is a useful forum of dialog. While we have no objection to it, I don't think we can point to it as having been a significant barrier to our ability to communicate with Congress or to Congress ability to get whatever information it wants from us.

As far as the agency being able to represent itself in court, we would favor that. It is not an authority which we now enjoy.

I hope I have accurately summarized my statement. I don't know if I took less time or more.

Senator SCHMITT. We will never know now, but I appreciate your effort.

One question, assuming that the aviation reform bill is not enacted, what do you think would be a realistic schedule for recodification efforts within the CAB?

Mr. ROBSON. I have been the victim of an earlier recodification in the DOT.

It is a very demanding job, Senator Schmitt, and is terribly technical and detailed. I think you need 3 years at least to do it. You have got to put—what you have to do is put a special team on the project.

It is a highly demanding, technical job and you have to bring in people who will sit down and do nothing else but that until it gets done.

It is doable, has been done and in other cases—DOT did it. It just takes time and effort to do it.

Senator SCHMITT. Do you feel that the present rules and regulations under the cognizance of the Board are in a shape that the average citizen who may have need to assess those rules can do that and do it in a fairly expeditious way.

Mr. ROBSON. I doubt you could say that about any agency. I think ours are reasonably clear but I don't think that the guy on the street, walking up and picking up our regulations, would find his way exactly to the heart of the matter. I think, frankly, that is in part an inherent problem once you get into regulation.

I don't say that they can't be improved, but it is somewhat of an inherent issue in regulation.

I think we can improve them. I don't think they are in horrible shape, but I know they can be improved.

Senator SCHMITT. Do you ever have the feeling that you're acting as a branch of Congress as you issue regulations that have the force of law?

Mr. ROBSON. I think that we are sensitive to our position, as Congress delegate to carry out its regulatory functions.

I can't say to you that, in every case, we issue a regulation, we think of ourselves as Senators or Congressmen. But I also think we have ample opportunity in the course of our activity to answer to Congress for the rules and regulations that we prescribe, and I should say that it is probably been more the case with the Civil Aeronautics Board than perhaps other agencies.

At least in the recent years we have had a good deal of time spent with your—with this committee and with our colleagues elsewhere on our regulatory policies as they are reflected in our rules.

Senator SCHMITT. The only major exception being you don't have to run for office based on the rules and regulations that you pass.

Mr. ROBSON. We sure don't.

Senator SCHMITT. Thank you very much.

I think we need to move on.

There will be other questions submitted to you for the record. Some that I have and some that the Committee has.

Mr. ROBSON. Very good.

[The statement follows])

STATEMENT OF HON. JOHN E. ROBSON, CHAIRMAN, CIVIL AERONAUTICS BOARD

Mr. Chairman and Members of the Committee, the Civil Aeronautics Board is pleased to present its views on S. 263, the Interim Regulatory Reform Act. The proposed legislation covers seven major regulatory agencies and con-

tains interim regulatory reform measures directed to certain of the problems these agencies have in common. The Board basically supports the objectives and underlying philosophy of this legislation. Indeed, the Board has itself recommended to Congress reform legislation designed, in soem instances, to address the same problems addressed by this bill. However, Congress' review of the Board and its governing law—the Federal Aviation Act—has already been extensive and is much further along than its review of other regulatory agencies. We believe that the current regulatory reform hearings before the Subcommittee on Aviation, the hearings held by the same Subcommittee last year, and the review by the Judiciary Subcommittee on Administrative Practice and Procedure in 1974 and 1975, constitutes a comprehensive body of legislative material which can serve as a foundation for the enactment of reform legislation more extensive than that called for in S. 263. In these circumstances, we suggest that those provisions of S. 263 which this Committee deems appropriate to the legislation pending before the Aviation Subcommittee be brought to that Subcommittee's attention and be integrated with the other reform bills currently under consideration.

With these preliminary comments in mind, we would like to address a few of the specific provisions of S. 263 and discuss how they would affect or be affected by the aviation regulatory reform legislation being considered by the Subcommittee on Aviation.

REVISION OF STATUTES, RULES AND REGULATIONS

Section 13, paragraphs (a) through (g) of the bill, deals exclusively with the Board. Paragraphs (a) and (b) would require a comprehensive recodification of all of the Board's present rules and regulations and a full and complete review of the present statutes affecting the Board for the purpose of suggesting reform legislation. The Board has already submitted to Congress a suggested revision of our governing statute as part of our recommended regulatory reform program (a copy of the Board's March 21, 1977 presentation to the Subcommittee on Aviation, which includes that proposal and other materials, is attached for the convenience of the Committee). We feel that our presentation satisfies to a great extent that portion of the bill which would require a law revision study.

All of the legislative regulatory reform proposals pending before the Aviation Subcommittee would also require a revision of the Board's rules and regulations. The Board would adopt appropriate rules and regulations and would welcome any aid Congress might wish to give us in this regard.

We appreciate the fact that Congress recognizes the additional workload such a recodification would impose upon a small agency such as the CAB, and has included in S. 263 a provision for additional personnel to direct such an undertaking. We suggest that the recodification provision be adapted to, and incorporated into, the other legislation now pending, along with a more appropriate and realistic schedule of completion date.

PROCEDURAL REFORM

The sponsors and supporters of S. 263 have recognized the need to establish time limits on the issuance, amendment, or appeal of orders, or regulations. The Board fully supports the need for time limits, and already has taken independent action to establish fixed deadlines with respect to rulemakings and has adopted a practice of public announcement of specific target dates for decisions by Administrative Law Judges and the Board in all hearing cases. Moreover, our regulatory reform program recommends legislation which would require the Board to establish by rule fixed time deadlines.

The Board has also undertaken a comprehensive evaluation of its internal procedures and administration. As part of that evaluation the Board began the planning, design, and implementation of a comprehensive computer-based system to inventory and schedule all docketed items pending at the Board. This project, known as the Work Item Tracking System (WITS), creates a management tool for setting completion dates for each step in the decisional process, from filing to final decision. This system will enable the Board to impose and enforce time deadlines on virtually all its work items. The system is already operational for much of the Board's docketed items. If an item

does not move to the next step on its assigned schedule, the Board knows of this lapse within twenty-four hours and can take appropriate action.

We do, however, advise against the imposition of fixed deadlines by statute. We believe that such deadlines should be established, but that ingraining them in a statute precludes the flexibility that it needed. We believe Congress should require regulatory agencies to set such deadlines by rule and that the agency's performance under those deadlines be continuously reviewed by the appropriate Congressional committees as part of their ongoing oversight responsibilities.

APPROPRIATIONS

Section 13(g) places a ceiling on the amounts which could be appropriated in fiscal years 1978, 1979, and 1980, to carry out the functions of the Board. Such a limitation does not seem consistent with the flexibility needed during a time of transition. The Board has traditionally been frugal and believes that the imposition of any such ceiling at this time would be inconsistent with accomplishing the undertakings set forth in any of the pending aviation regulatory reform bills. We suggest that decisions on this issue be deferred until a bill emerges from the Committee and appropriate estimates with respect to the budget can be made.

TENURE AND CONFLICTS OF INTEREST

The current law provides that "the President shall designate annually one of the Members of the Board to serve as Chairman and one of the Members to serve as Vice Chairman." S. 263, section 13(f), would provide for appointment of a Chairman and Vice Chairman by the President, with the advice and consent of the Senate, for a term of three years.

We defer to the judgment of the Congress as to whether it is desirable to lengthen the terms of the Chairman and Vice-Chairman and subject their appointment to the requirement of Senate confirmation.

Considerable attention has been focused on the need for those who serve in the Government to avoid conflicts of interest or the appearance of conflicts of interest. S. 263 provides a bar to a former regulatory commissioner appearing before his agency for two years.

Over the past several months the Board has been re-examining its various Rules of Conduct relating to conflicts of interest. On the matter of post-employment conduct, the final regulation adopted by the Board conforms to the existing provisions of Title 18 of the U.S. Code. Thus, a former Board Member is permanently disqualified from acting as agent or attorney before the Board in any matter in which he or she participated "personally and substantially" as a Board Member, and is disqualified for a period of one year from appearing personally before the Board on any matter which was under his or her "official responsibility." It is our judgment that the latter disqualification precludes a former Board Member from appearing on any matter which was before the Board while he or she was a Board Member, but does not preclude appearance on new matters. The bill would preclude appearance on new matters as well as old.

The issue addressed by the bill is one of a number of pre- and post-government employment problems now being considered throughout the government. The Board itself has a review of this matter under way—one that extends to staff as well as Board Members. The Carter Administration has also promised legislation or executive action in this area. We suggest that Congressional action be deferred until the problem is examined in this broader context.

CONGRESSIONAL ACCESS TO INFORMATION AND MISCELLANEOUS ISSUES

Section 13(b) of the bill also requires the Board to forward statements submitted to the OMB concurrently to the Congress. Similar language was included in S. 3308 of the 94th Congress, and has been included recently in legislation establishing the Commodity Futures Trading Commission. Such language reflects the Congressional view that budget information, legislative recommendation, testimony or comments on legislation may be less candid if they pass through the filter of the Office of Management and Budget.

While we find no real problem with such a provision, we are not aware that our independent views have been inhibited in any way by the OMB.

There are times when the OMB clearance process raises constructive issues for discussion and, on balance, there is no harm, in our judgment, to continuing such a process because, in the final analysis, the Congress is always able to ascertain the views of the Board.

The Board supports the court representation section, but would suggest technical modifications which would make certain that the provision does not affect the ordinary procedures for judicial review of the Board's orders pursuant to section 1006 of the Federal Aviation Act. Indeed, the Board has submitted legislation to prior Congresses that would place our judicial review proceedings under the Hobbs Act and at which the Board would appear as a party to be represented by its own counsel and to file various writs.

The protective revisions of section 1114 of Title 18 of the Act's code would be expanded to bring investigative members of the Board within its scope. Although the Board has not experienced any problems in this area, we have no objection to the provision.

CONCLUSION

Mr. Chairman, we would be happy to answer any questions you or your colleagues might have.

Senator SCHMITT. The next witness is Karl E. Bakke, Chairman of the Federal Maritime Commission—FMC.

If you could summarize your statement. The entire statement, like all others, will be included in the record.

STATEMENT OF HON. KARL E. BAKKE, CHAIRMAN, FEDERAL MARITIME COMMISSION

Mr. BAKKE. Accompanying me today are Francis C. Hurney, the Commission's Acting Managing Director; and Richard E. Hull, general counsel of the Commission.

If enacted, this legislation would require the FMC and the six other independent, regulatory agencies that are subject to the jurisdiction and oversight responsibility of this committee, to review and recodify all of their current rules and regulations, and to develop and submit to the Congress a plan for updating and systematically recodifying all the statutory and other authorities that they administer.

Moreover, S. 263 would apply across-the-board requirements on each of the seven agencies relevant to timely consideration of petitions, to congressional access to information held or disseminated by the agency, to representation by or on behalf of these agencies in civil actions, to public accountability by employees of these agencies, to conflict-of-interest restrictions on activities of agency Commissioners or members, to appointment and tenure of agency chairmen, and to appropriation authorizations for continued operations.

As Senator Pearson remarked in a statement on the Senate floor on January 14, 1977, S. 263 is designed to extend the same regulatory reforms to all seven agencies: without seeking, however, to alter the particular economic, regulatory policies established over the years by each of these agencies.

With this perspective in mind, I shall address my comments to section 15, the section of the bill that contains the specific statutory amendments designed to apply uniform regulatory reforms to the Federal Maritime Commission. The proposed regulatory reforms would be accomplished by amending Reorganization Plan No. 7 of 1961, under which the Commission was originally established as a successor to the Federal Maritime Board.

Detailed comments on section 15 of the legislation are contained in my statement. I would like to direct my remarks now to two points of major substantive concern: to the Commission first, the law revision provisions of section 15(a) of the bill and, second, to the conflict-of-interest provisions of section 15(b).

With respect to the law revision provisions, section 106(b) would require the FMC, in cooperation with the Secretary of Commerce, the Secretary of Transportation, and other interested Federal Government establishments, to review completely and analyze applicable statutory and case law relating to its authorities, in order to assist the Congress in amending title 46 of the United States Code for the purpose of coordinating and modernizing the laws of the United States relating to shipping, to enhancing commerce, and to protecting consumers.

Section 106(b)(2) provides, upon the approval of three or more Commissioners, for the appointment of a law revision director, the employment of a supportive staff for such individual, and the authority to hire additional experts and consultants necessary to fulfill the duties imposed by this section.

Section 106(b)(3) would require the establishment of an internal advisory committee on law revision. Members of the advisory committee would be appointed by the Chairman of the Commission, who would serve with the Secretaries of Commerce and Transportation as ex officio members.

Section 106(b)(4) defines the methods to be employed in soliciting, compiling, and reporting the findings and recommendations of the law revision director and the advisory committee.

Finally, under section 106(b)(5), the Chairman of the Commission would be required to submit a preliminary report to the Congress and to the President within 6 months of its enactment with respect to law revision activities, and a final report within 2 years containing the text of proposed revisions and codification, accompanied by a detailed analysis relating to the advisability of any such proposals.

The review mandated under section 106(b)(1)(B) encompasses not only the statutes administered by the FMC but all other laws set forth in title 46 of the United States Code. Thus, the review also would encompass the many statutory provisions designed to promote our merchant marine. I fully agree that a fragmented review of our maritime policy would serve no useful purpose in view of the interrelation between policies regulating transportation in our ocean trades and those designed to promote our merchant marine.

To give but one example, should the United States enact cargo preference laws reserving for U.S.-flag vessels a substantial portion of the tonnage transported to and from the United States, this would have a considerable impact on the size and makeup of our merchant marine and would require a reappraisal of the current maritime subsidy programs administered by the Maritime Administration, which is an organizational element of the Department of Commerce.

On March 8, 1977, in the course of an address before the American shipper international forum in New York City, I stated that:

A thorough and critical review by Congress of the Shipping Act and other statutes that collectively comprise our national ocean transportation policy is

long overdue. This could well be a propitious time for oversight hearings, to consider whether our current national ocean transportation policy still furthers the overall national interest.

With your leave, Mr. Chairman, I would like to submit the full text of that speech for the record.[1]

Senator SCHMITT. That will be received.

Mr. BAKKE. I was gratified to learn that my views as to the need for a thorough reappraisal of our maritime policy were shared by the chairman of your Subcommittee on Merchant Marine and Tourism, and by the chairman of the House Committee on Merchant Marine and Fisheries.

Although I do not question the need for recodification of our shipping statutes to eliminate inconsistent and obsolete provisions, the reappraisal that I have advocated would be much more sweeping and fundamental. It would be of marginal utility to draft and enact a multitude of amendments designed to facilitate the implementation of our present maritime policy, a policy that was formulated several decades ago, if, in fact, this policy is no longer in our best national interest.

In my opinion, the first job at hand is to explore the pros and cons of all reasonable options with a view toward formulating whatever overall maritime policy will be in our best national interest for this day and age. Assuming that adequate resources were allocated to such a project on a priority basis, I believe that the 6 month deadline provided in section 106(b)(5) for the submission of a preliminary report to the Congress still would be totally unrealistic. Moreover, I seriously question the appropriateness of giving the FMC the lead role in a project of such scope.

This review would require, in effect, consideration of an extremely broad spectrum of national concerns, including national security, balance-of-trade, energy, unemployment, U.S. international relations, subsidy programs, antitrust policy, consumer affairs, and environmental impact, to cite only a few that have occurred to me. The study would seek to determine the means best suited to preserve a healthy U.S. merchant marine and to assure stability in the U.S. ocean trades. But, in so doing, all the aforementioned concerns would have to be taken into account.

Although this Commission is well qualified to participate in, and contribute to, such a study, I believe that in view of the broad range of national issues involved that would require participation by most of the departments and agencies in the executive branch, the responsibility for its coordination should logically rest with the President or his designee.

Turning to the conflict of interest provisions, section 15(b) of S. 263 would amend section 102 of reorganization plan No. 7 of 1961, by adding a new subsection (e). That proposed new subsection would provide that no Commissioner could have other business interests while serving his term, nor could any Commissioner who was so serving as of May 11, 1976, represent any person before the Commission in a professional capacity for 2 years following his departure from the Commission.

[1] At the time of going to press the material was not received.

The provisions of this subsection seem ill-advised for several reasons. Certainly a more precise definition of "other business, vocation, profession, or employment" should be required. Furthermore, there appears to be an underlying assumption of venality on the part of those who are chosen and appointed as members of administrative agencies, when the facts tend to support an opposite conclusion. Such individuals are selected by the President on the basis of their background, experience, and character, and are required to submit to confirmation hearings before appropriate committees of Congress. Thus, prior to assuming the positions of public trust and confidence to which they have been appointed, the members of various agencies are subject to scrutiny by the executive branch in the initial selection process, and by Members of Congress who sit on the confirming committees, as well as by any member of the public who wishes to provide information, favorable or unfavorable, to such committees of Congress. Surely, in the course of these procedures, undesirable candidates can and should be excluded.

Moreover, no explanation is offered regarding the bill's 2-year prohibition against representation before the Commission by a former Commissioner, vis-a-vis the 1-year disqualification contained in current Civil Service rules. The FMC's rules of practice and procedure contain a provision similar to the Civil Service rules, that prohibits such representation for a 1-year period (46 C.F.R. 502.32). This provision has been in effect since 1970 without complaint from any quarter regarding its substance, implementation, or effect. Moreover, since Commissioners are appointed and reappointed for 5-year terms, past associates of former Commissioners may still be sitting on the Commission after the 2-year period has lapsed. Thus, if this period of disqualification is designed to preclude any benefits resulting from practice before former colleagues, the disqualification for 2 years would fail to achieve its purpose.

On the other hand, we believe this bill would be the ideal vehicle for amending the organic acts of each of the designated independent regulatory agencies to eliminate unnecessary restrictions on financial holdings by officials and employees of such agencies and to enact, in lieu thereof, reasonable restrictions uniformly applicable to the seven agencies.

The Report by the Senate Committee on Government Operations, issued in January of this year pursuant to S.Res. 71, recognized the unreasonableness of some of the statutory restrictions on financial holdings that are currently applied to members and employees of seven regulatory agencies. The committee expressly recommended on page 61 of volume 1 of this report that the Organic Acts of these seven agencies should be amended to reflect more equitable and reasonable prohibitions, and set forth draft language for that purpose. That recommendation was addressed to the conflict of interest provisions of six of the seven agencies that would be affected by S. 263, including the Federal Maritime Commission.

I cannot, of course, speak on behalf of other regulatory agencies as to the need for any amendments to their organic acts. I can, however, urge, as I have in the past, that appropriate congressional action be taken to relieve members and employees of the FMC from the cur-

rent unreasonable and totally unnecessary restrictions on their financial holdings and those of their families contained in section 201(b) of the Merchant Marine Act of 1936.

Rather than take the time of this committee by describing in detail the history of this provision and its oppressive impact on Commission employees, I would request your leave, Mr. Chairman, to submit a memorandum thereon for the record.[2]

Senator SCHMITT. That is acceptable.

I appreciate your remarks and your additional testimony. I have a few questions. You have suggested that the Commission is not the proper body to conduct the law revision activity, but you support that type of thing in a generic sense.

Mr. BAKKE. Yes.

Senator SCHMITT. You mentioned the President as being the appropriate person or his designee. Do you have any further comments as to how you would visualize the President or his designee actually conducting such a review for your Commission, which has broad, sweeping action with respect to the rest of the Government?

Mr. BAKKE. As the Commission has proposed, the first order of business would be to put together a study that embraces membership on a much broader scale than is specifically referred to in the proposed legislation. As I indicated earlier, the impact contemplated with respect to ocean transportation cuts across the responsibilities of a substantial number of agencies: the EPA; perhaps the USDA with respect to Public Law 480 traffic and the required use of U.S. bottoms for that traffic; the DOD; and the Department of State.

Senator SCHMITT. You are suggesting it be an interagency group as far as your Commission is concerned? Under the chairmanship of whom? Who would you suggest or what agency?

Mr. BAKKE. I would leave that designation to the President's judgment, depending upon what he perceives to be the desired thrust and scope of the study. Obviously, the persons designated to the Commission would be senior officials of the departments and agencies that are impacted, and, as I indicated in my testimony, a rather substantial support staff would be required to do the collection, analysis, and evaluation for policy overlay.

Senator SCHMITT. I agree. Another question. As you know, the President is requiring all of his appointees to agree to a 2-year disqualification provision after service. Why should that not be enacted into law? You seem to favor the 1-year.

Mr. BAKKE. In my view, 1 year or 2 years is ineffective to accomplish what appears to be the desired purpose of that restriction. With respect to appointees to this Commission, their term of appointment is 5 years. In the case of some of the other agencies, it is longer. A member of a Commission who leaves his position for one reason or another, even with an intervening period of 2 years, is free to practice before the agency and could still be presenting matters to his former colleagues on the Commission. And, of course, you have the problem of reappointments to terms as well.

It is not merely the fact that his fellow Commissioners at the time of his departure from the Commission would still be sitting at the

[2] At the time of going to press the material was not received.

end of the 2-year period. If any are reappointed, it would add a further dimension. So, I think a 2-year requirement just would not do the job, if the purpose of the Congress is to inhibit the practice by former agency members before their former colleagues.

Senator SCHMITT. What if it was primarily a restriction as, I think, one of the other agencies testified they currently have, a restriction on representation with respect to cases or issues that were before the Commission during their tenure on the Commission? Would it be better to have a general prohibition, saying you cannot represent a case before the Commission which arose during your tenure?

Mr. BAKKE. That restriction already applies both by statute and by regulation. There is a flat prohibition with respect to any official or employee of a Government agency who leaves the agency from forever representing parties in an adjudicatory matter that was substantially under his direction, control or participatory role while with the agency. And there is a further 1-year restriction on practice before the agency with respect to any other matters that were pending at the agency during his term of employment.

Senator SCHMITT. I appreciate those clarifying comments. What, very briefly, of course, are the "current, unreasonable and totally unnecessary restrictions on financial holdings"?

Mr. BAKKE. That is dealt with in some length in the memorandum I have proposed for the record.

Senator SCHMITT. Excellent.

Finally, do you have any estimate of the number of rulemaking activities that are still outstanding before the Commission since 1974?

Mr. BAKKE. With respect to that subject, Mr. Chairman, we have 36 substantive rules promulgated by the Commission in the period referred to, of which only 12 were promulgated prior to 1967. And, based upon that, as I indicate in my statement, we question whether there is a need at this time for such a broad-scale recodification.

Senator SCHMITT. We appreciate your testimony and we will move on to the next witness.

[The statement follows:]

STATEMENT OF KARL E. BAKKE, CHAIRMAN, FEDERAL MARITIME COMMISSION

Mr. Chairman, I appreciate this opportunity to appear before your Committee to discuss S. 263, a bill "to provide interim regulatory reform as to certain independent regulatory agencies."

Accompanying me today are Mr. Francis C. Hurney, the Commission's Acting Managing Director, and Mr. Richard E. Hull, General Counsel of the Commission.

If enacted, this legislation would require the Federal Maritime Commission and the six other independent regulatory agencies that are subject to the jurisdiction and oversight responsibility of this Committee, to review and recodify all of their current rules and regulations, and to develop and submit to the Congress a plan for updating and systematically recodifying all the statutory and other authorities that they administer. Moreover, S. 263 would apply across-the-board requirements on each of the seven agencies relevant to timely consideration of petitions, to Congressional access to information held or disseminated by the agency, to representation by or on behalf of these agencies in civil actions, to public accountability by employees of these agencies, to conflict of interest restrictions on activities of agency Commissioners or Members, to appontment and tenure of agency Chairmen, and to appropriation authorizations for continued operations.

As Senator Pearson remarked in a statement on the floor of the Senate on January 14, 1977, S. 263 is designed to extend the same regulatory reforms to all seven agencies, without seeking, however, to alter the particular economic regulatory policies established over the years by each of these agencies. With this perspective in mind, I shall address my comments to section 15, the section of the bill which contains the specific statutory amendments designed to apply uniform regulatory reforms to the Federal Maritime Commission. The proposed regulatory reforms would be accomplished by amending Reorganization Plan No. 7 of 1961, under which the Commission was originally established as a successor to the Federal Maritime Board.

RULES RECODIFICATION

Under section 15(a) of the bill, a new section 106 would be added to the end of Part I of Reorganization Plan No. 7. Under section 106(a), within 360 days of enactment, the Federal Maritime Commission would be required to submit to the Congress and to the Administrative Conference of the United States an initial proposal detailing a recodification of all existing and pending agency rules. Within 570 days of enactment, the Commission would be required to submit to the Congress a final proposal regarding such recodification, incorporating, where appropriate, any comments received from the Administrative Conference and from the public pursuant to publication in the *Federal Register*.

Periodic review of the rules of this Commission, including the submission of comments from the Administrative Conference and other interested parties, would certainly be helpful in determining regulatory responsiveness to current industry practices, in evaluating the degree of conformity of our rules to recent agency and judicial decisions, and in identifying ambiguities, overlaps, omissions, inconsistencies and the consequent need for revision. In this context, the Federal Maritime Commission has made a concerted effort during the past few years to effectuate internal administrative reform, and has established a high level staff committee, chaired by our Vice Chairman, that has met regularly over the past two years to address such matters.

The rules of the Commission have all been promulgated since its establishment in 1961, with the exception of the rules pertaining to Filing of Freight and Passenger Rates, Fares and Charges in the Domestic Offshore Trade, which were originally promulgated in 1948, but revised and repromulgated in 1963. In fact, of the 36 rules promulgated by the Commission, only 12 rules were promulgated prior to 1967. On this basis, we question the immediate need for a complete recodification of all existing rules of this Commission, that would require a substantial assignment of manpower. In any event, we believe it is inadvisable to mandate time frames by statute for conducting such a recodification process. If the normal course of commentary and review is circumvented by working under such deadlines, the end product may well be hastily and poorly drafted rules.

Finally, we believe that the language of section 106(a)(1), as drafted, is somewhat confusing. Section 106(a)(1) states that "The rules, as proposed to be recodified, shall not be at variance in any substantive respect with the text of the rules of the Federal Maritime Commission which are in effect or proposed as of the date of such submission." We interpret this sentence to imply that the recodification process contemplated by the bill is intended to be technical, rather than substantive, in nature. This provision appears to relate to the initial proposal. Section 106(a)(3), however, makes no reference to the degree of "variance" that may, or may not, be interjected into the rules in the final proposal of recodification. A question arises, therefore, as to the extent to which the Federal Maritime Commission could or should avail itself of any comments of a substantive nature that might be submitted to it by Congress, the Administrative Conference, and other sources. Therefore, we suggest that this ambiguity be clarified by corrective language.

LAW REVISION

The provisions of section 106(b)(1) would require the Federal Maritime Commission, in cooperation with the Secretary of Commerce, the Secretary of Transportation, and other interested Federal government establishments, to review completely and analyze applicable statutory and case law relating to

its authorities, in order to assist the Congress in amending Title 46 of the United States Code for the purpose of coordinating and modernizing the laws of the United States relating to shipping, to enhancing commerce, and to protecting consumers.

Section 106(b)(2) provides, upon the approval of three or more Commissioners, for the appointment of a law revision director, the employment of a supportive staff for such individual, and the authority to hire additional experts and consultants necessary to fulfill the duties imposed by this section.

Section 106(b)(3) would require the establishment of an internal "Advisory Committee on Law Revision." Members of the Advisory Committee would be appointed by the Chairman of the Commission, who would serve with the Secretaries of Commerce and Transportation as *ex officio* members. Section 106(b)(4) defines the methods to be employed in soliciting, compiling and reporting the findings and recommendations of the law revision director and the Advisory Committee. Finally, under section 106(b)(5), the Chairman of the Commission would be required to submit a preliminary report to the Congress and to the President within six months of its enactment with respect to law revision activities, and a final report within two years containing the text of proposed revisions and codification, accompanied by a detailed analysis relating to the advisability of any such proposals.

The review mandated under Section 106(b)(1)(B) encompasses not only the statutes administered by the Federal Maritime Commission but all other laws set forth in Title 46 of the United States Code. Thus, the review also would encompass the many statutory provisions designed to promote our merchant marine. I fully agree that a fragmented review of our maritime policy would serve no useful purpose in view of the interrelation between policies regulating transportation in our ocean trades and those designed to promote our merchant marine. To give but one example, should the United States enact cargo preference laws reserving for U.S. flag vessels a substantial portion of the tonnage transported to and from the United States, this would have a considerable impact on the size and makeup of our merchant marine and would require a reappraisal of the current maritime subsidy programs administered by the Maritime Administration.

On March 8, 1977, in the course of an address before the American Shipper International Forum in New York City, I stated that: "A thorough and critical review by Congress of the Shipping Act and other statutes that collectively compromise our national ocean transportation policy is long overdue. This could well be a propitious time for oversight hearings, to consider whether our current national ocean transportation policy still furthers the overall national interest."

I was gratified to learn that my views as to the need for a thorough reappraisal of our maritime policy were shared by the Chairman of your Subcommittee on Merchant Marine and Tourism and by the Chairman of the House Committee on Merchant Marine and Fisheries. Although I do not question the need for recodification of our shipping statutes to eliminate inconsistent and obsolete provisions, the reappraisal which I have advocated would be much more sweeping and fundamental. It would be of marginal utility to draft and enact a multitude of amendments designed to facilitate the implementation of our present maritime policy, a policy which was formulated several decades ago, if, in fact, this policy is no longer in our best national interest. In my opinion, the first job at hand is to explore the pros and cons of all reasonable options with a view towards formulating whatever overall maritime policy will be in our best national interest for this day and age. Assuming that adequate resources were allocated to such a project on a priority basis, I believe that the six month deadline provided in section 106(b)(5) for the submission of a preliminary report to the Congress still would be totally unrealistic. Moreover, I seriously question the appropriateness of giving the Federal Maritime Commission the lead role in a project of such scope.

This review, would require, in effect, consideration of an extremely broad spectrum of national concerns, including national security, balance-of-trade, energy, unemployment, U.S. international relations, subsidy programs, antitrust policy, consumer affairs, and environmental impact, to cite only a few that have occurred to me. The study would seek to determine the means best suited to preserve a healthy U.S. merchant marine and to assure stability in the U.S. ocean trades. But in so doing, all the aforementioned concerns would

have to be taken into account. Although this Commission is well qualified to participate in, and contribute to, such a study, I believe that, in view of the broad range of national issues involved which would require participation by most of the Departments and agencies in the Executive Branch, the responsibility for its coordination should logically rest with the President or his designee.

PETITIONS

Section 106(c) would require that the Commission act within 120 days on petitions for the commencement of a proceeding for the issuance, amendment or appeal of an order, rule, or regulation. Within 60 days of denial of such petition, or within 60 days of the expiration of such 120 day period without action from the Commission, a petitioner could commence a civil action in an appropriate district court in the nature of *mandamus* and would prevail if he could demonstrate, to the satisfaction of the court: a) that the failure of the Commission to grant the petition was arbitrary and capricious; b) that the action requested in such petition was necessary, and c) that the failure of the Commission to take such action will result in the continuation of practices which are not consistent with the responsibilities of the Commission.

The relief could be obtained in the form of a Court Order directing the Commission to institute a proceeding. However, the Court could not compel the Commission to take any other action.

The role of the Commission and of its administrative law judges would appear to be unaffected by these provisions, and there can be no sound objection to the 120-day time limit within which the Commission must act or risk court action. As presently drafted, however, section 106(c) could be construed to authorize a judicial challenge of a final Commission order or ruling long after the 60-day time limit for appeal of a final Commission order under the Hobbs Act (28 USC § 2344). It would depend largely upon the interpretation to be given to the term "commencement of a proceeding," which is left unrefined. We would assume that the drafters of section 106(c) did not contemplate that a petition for Reconsideration of a final Commission discussion would be considered to fall in the category of a petition for "the commencement of a proceeding." However, the Petitioner might couch a Petition for Reconsideration in the form of a petition to amend the final order of the Commission for which it seeks review. If such a Petition were thereby considered to be for "the commencement of a proceeding," a party seeking review of the order could wait until after the expiration of the 60-day time limit for appeal and review by the Court of Appeals under 28 USC § 2344, and would still have the opportunity to argue the merits of his cause before a District Court.

To prevent this potential problem the Commission would suggest that a new paragraph 6 be added to section 106(c), to read as follows:

"(6) Nothing in this subsection shall be construed to modify or extend the statutory time limit for petitions to review final orders as set forth in the Hobbs Act (28 USC § 2344)."

CONGRESSIONAL ACCESS TO INFORMATION

Sections 106(d)(1) and 106(d)(2) would deny any officer or agency of the United States the authority to require the Commission to submit its legislative recommendations, testimony, or comments on legislation, for review, comments, or approval prior to the submission of such materials to Congress. Moreover, in those situations where agencies transmit budget estimates, requests, information, legislative recommendations, testimony, or comments on legislation, to the President or to the Office of Management and Budget, copies of the same would be required to be submitted simultaneously to Congress.

The concurrent transmission of budgetary and legislative materials to the Office of Management and Budget and to Congress has been approved previously for the Federal Trade Commission, the National Transportation Safety Board, the Interstate Commerce Commission, the Consumer Product Safety Commission, and the National Railroad Passenger Corporation. The Federal Maritime Commission has no objection to the enactment of sections 106(d)(1) and 106(d)(2).

When a committee of Congress responsible for the Commission's appropriations submits a request for documents in the Commission's possession or subject to its control, section 106(d)(3) would require the Commission to comply

with such request within 10 days of receipt thereof. In the event that the Commission did not possess the requested materials, it would be required to so notify the committee within the same time frame, and to estimate the date by which it could obtain such documents. Moreover, the transfer of such documents by the Commission to any person or other governmental entity would have to be predicated upon a "guarantee" that the transferee would return these when necessary to enable the Commission to comply with the Congressional requests described in section 106(d)(3).

It appears that the broad language used in this section might encompass *any* agency document, including, *inter alia*, internal memoranda and communications, staff reports, investigatory files, and individual company business data that have been submitted to the Commission on a confidential basis. While I do not question the right of the committees of Congress to obtain access to documents of a sensitive nature when these are required in the discharge of their legislative responsibilities, I firmly believe that the Congress should enact self-imposed safeguards that would preclude public disclosure of documents and information that are otherwise exempted from the public disclosure requirements of the Freedom of Information Act.

REPRESENTATION

In civil actions where the Commission or the Attorney General, on behalf of the Commission, is authorized to commerce, to defend, or to intervene, section 106(e) would enable the Commission to take these actions and supervise the resulting litigation, independent of any decision by the Attorney General, if: 1) the Commission has notified the Attorney General in writing, and undertaken to consult with him regarding such action; and 2) the Attorney General failed within 45 days of receipt of such notification to commence, defend, or intervene in such actions.

In actions where the Attorney General has been notified in writing, the Commission would have the authority, pursuant to section 106(e)(2), to seek temporary or preliminary injunctions, or to initiate the defense of any action. and such authority would continue so long as the Attorney General failed, within 45 days, to assume the prosecution or defense thereof.

This representation provision follows, in part, the authority given to the Federal Trade Commission in November 1973, by Public Law No. 93–153, and would permit the Federal Maritime Commission, subject to notice to, and inaction by, the Attorney General, to prosecute civil penalty actions in its own name. Permission to prosecute timely civil violations would be a welcome addition to the Commission's present enforcement tools. It would round out existing compromise and settlement authority pursuant to Public Law No. 92–416, and permit Commission attorneys, who are familiar with the applicable statutes and the ocean commerce shipping industry, to participate more fully in the planning, trial, and settlement of civil penalty prosecutions.

However, section 106(e) would, albeit unintentionally, restrict the Commission's existing ability under section 29 of the Shipping Act, 1916, to proceed directly, without notice or 45-day wait, with a district court action for the enforcement of a Commission order. Recourse to this authority has in the past proved expedient for judicial enforcement of Commission subpoenas and discovery orders, and should be preserved in its present form.

Finally, some ambiguity exists regarding the provisions of section 106(e)(2). If the Commission is to be authorized under this subsection to initiate, in its own name, actions for temporary or preliminary injunctive relief upon notification to the Attorney General without any waiting period, a question arises regarding the purpose of the second sentence of section 106(e)(2), which authorizes the Attorney General to assume the prosecution or defense of any such action within 45 days of receipt of such notification.

The effects of this ambiguity would be confusion in the prosecution or defense of such actions, and could impede the Federal Maritime Commission in seeking timely judicial relief in the form of preliminary or temporary injunctions. Such emergency action often is essential to prevent violations of the shipping statutes, to prevent certain tariff changes from becoming effective, or to prevent a passenger ship operator from advertising, soliciting, and collecting deposits for cruises before receiving proper certification from the Commission. In order to resolve this ambiguity, consideration should be given to granting to the

Federal Maritime Commission injunctive authority similar to that available to the Federal Trade Commission. Under that authority, the Federal Trade Commission may bring suit in its own name to enjoin any violation of law enforced by the Federal Trade Commission, pending resolution of the matter before that agency.

ACCOUNTABILITY

Section 106(f) defines the circumstances under which an action may be maintained against the United States based upon the actions or omissions of the Commission or any of its employees, and establishes standards for such claim and for the granting of relief. Moreover, it would prohibit the use of Commission funds for payment in satisfaction of any judgment entered on a successful claim brought under this subsection.

Presently, the provisions of 28 U.S.C. § 2680 protect governmental agencies and employees exercising discretionary functions from liability for damages in a tort action based upon allegations of improper acts or omissions in their official capacities. Section 106(f), in partially removing such immunity, apparently intends to deter such acts or omissions, and to promote and enhance the diligent exercise of such discretionary functions. The Commission questions the basis for limiting accountability to acts or omissions which occur prior to January 1, 1979. In the absence of any demonstrated need for this expiration date, we would recommend its deletion.

CONFLICTS OF INTEREST

Section 15(b) of S. 263 would amend section 102 of Reorganization Plan No. 7 of 1961, by adding a new subsection (e), to provide that no Commissioner could have other business interests while serving his term, nor could any Commissioner who was so serving as of May 11, 1976 represent any person before the Commission in a professional capacity for two years following his departure from the Commission.

The provisions of this subsection seem ill-advised for several reasons. Certainly a more precise definition of "other business, vocation, profession or employment" should be required. Furthermore, there appears to be an underlying assumption of venality on the part of those who are chosen and appointed as members of administrative agencies, when the facts tend to support an opposite conclusion. Such individuals are selected by the President on the basis of their background, experience, and character, and are required to submit to confirmation hearings before appropriate committees of Congress. Thus, prior to assuming the positions of public trust and confidence to which they have been appointed, the members of various agencies are subject to scrutiny by the Executive Branch in the initial selection process, and by members of Congress who sit on the confirming committees, as well as by any member of the public who wishes to provide information, favorable or unfavorable, to such committees of Congress. Surely in the course of these procedures, undesirable candidates can and should be excluded.

Moreover, no explanation is offered regarding the bill's two year prohibition against representation before the Commission by a former Commissioner, vis-a-vis the one-year disqualification contained in current Civil Service rules. The Federal Maritime Commissions Roles of Practice and Procedure contain a provision similar to the Civil Service rules, that prohibits such representation for a one-year period (46 C.F.R. 502.32). This provision has been in effect since 1970 without complaint from any quarter regarding its substance, implementation, or effect. Moreover, since Commissioners are appointed and reappointed for five-year terms, past associates of former Commissioners may still be sitting on the Commission after the two-year period has lapsed. Thus, if this period of disqualification is designed to preclude any benefits resulting from practice before former colleagues, the disqualification for two years would fail to achieve its purpose.

We do believe that this bill is the ideal vehicle for amending the organic acts of each of the independent regulatory agencies affected under S. 263, to eliminate any unnecessary restrictions on financial holdings by officials and employees of such agencies and to enact in lieu thereof reasonable restrictions uniformly applicable to the seven agencies. The Report by the Senate Committee on Government Operations, that was issued in January of this year pursuant to Senate Resolution 71, recognized the unreasonableness of some of the

statutory restrictions on financial holdings that are currently applied to members and employees of seven regulatory agencies. The Committee expressly recommended on page 61 of Volume 1 of this Report that the Organic Acts of these seven agencies should be amended as follows:

"(1) To prohibit ownership by the official or employee, his spouse or member of his immediate household of any holding in any company or subsidiary thereof whose activities are in significant part subject to regulation by that agency. The Civil Service Commission shall be charged with responsibility to review the holdings of Presidential nominees to the agency, and certify to the Senate prior to confirmation that the nominee has satisfactorily met, or intends to meet, the requirements of this section.

"(2) That this provision shall not preclude investment in investment companies (mutual funds), investment advisory companies or holding companies unless their investments are concentrated substantially in the companies covered above.

"(3) That the prohibition may be waived for an employee by the agency head and for an appointed official by the President upon a written determination made by such official that the financial interest is not so substantial as to be deemed likely to affect the integrity of the service which the government may expect from such officer or employee. Waivers granted pursuant to this authority shall be published in the *Federal Register* at least thirty days prior to their effective date."

The Federal Maritime Commission is one of the seven agencies expressly included in that recommendation. In fact, the Committee on Government Operations recommended these modifications in the conflict of interest provisions of six of the seven agencies affected under S. 263.

I cannot, if course, speak on behalf of the other regulatory agencies as to the need for any amendments to their organic arts. I can, however, urge, as I have in the past, that appropriate Congressional action be taken to relieve members and employees of the Federal Maritime Commission from the current unreasonable and totally unnecessary restrictions on their financial holdings and those of their families contained in section 201(b) of the Merchant Marine Act of 1936. Rather than take the time of this Committee by describing in detail the history of this provision and its oppressive impact on Commission employees, I would request your leave, Mr. Chairman, to submit a Memorandum thereon for the record.

I strongly urge that section 15(b) of S. 263 be amended by adding thereto a provision that would repeal Section 201(b) of the Merchant Marine Act of 1936 and amend Reorganization Plan No. 7, to establish new conflict-of-interest restrictions on financial holdings in accord with the recommendation of the Senate Government Operations Committee. I would defer to the six other agencies concerned as to whether S. 263 should also amend their respective organic acts to establish uniform restrictions on financial holdings for the seven agencies.

FIXED TERM OF CHAIRMAN

Section 15(c) of S. 263 would amend section 102 of Reorganization Plan No. 7 by deleting subsection 102(b), and substituting therefor a provision requiring a fixed three-year term for the Chairman of the Commission. Such appointment would be made by the President and require advice and consent of the Senate. Since the Federal Maritime Commission was established in 1961, those individuals appointed to Chair the Commission have served as Chairmen at the pleasure of the President, for unspecified periods of time. Under the provisions of section 102(b) now in effect, the President may appoint any Commissioner to the Chair. Although all Commissioners must be confirmed by the Senate, their appointment to the Chair during their term of office does not require reconfirmation. Thus, under the present system, the Senate does not know when it reviews an individual's qualifications for appointment to the Commission, whether or not this individual may later be called upon to assume the additional responsibilities of the Chair, unless, as in my case, such individual has been nominated by the President to be the Chairman prior to his confirmation.

Section 15(c) would assure the Senate an opportunity to review through the confirmation process every Presidential appointment to the Chair. We have no objection to this modification, nor to providing a fixed term of three years for the Chairman of the Commission.

There is, however, an ambiguity which should be clarified. We assume that Section 15(c) contemplates that, upon expiration of his three-year term, the Chairman would remain on the Commission for the balance of his five-year term as Commissioner. However, it is unclear whether an individual appointed to the Chair more than two years following his appointment to a five-year term as Commissioner, could serve the full three-year term in the Chair without being reappointed as a Commissioner. This also raises a question as to whether an individual who is appointed to fill a former Commissioner's unexpired term of less than three years, may serve as Chairman for a full three-year term without reappointment. We suggest that Section 15(c) be amended to clarify this ambiguity.

APPROPRIATIONS

Finally, section 15(d) of S. 263 would hold this Commission to specific appropriation authorization ceilings for Fiscal Years 1978, 1979, and 1980. I believe that legislation that is limited to effecting procedural reforms should not predetermine the amounts which may be required to carry out an agency's program responsibilities. The inadvisability of including any authorization ceilings in S. 263 can perhaps best be illustrated by the following table which compares for Fiscal Years 1978, 1979 and 1980 the amounts allowed the Commission by the Office of Management and Budget with the ceilings contemplated in S. 263 for these same years.

Fiscal year	Federal Maritime Commission request as approved by the President	S. 263
1978	$8,901,000	$8,715,000
1979	[1] 8,901,000	9,130,000
1980	[1] 8,901,000	9,545,000

[1] Projected.

Time has not permitted obtaining advice from the Office of Management and Budget as to the compatibility of these comments with the program of the President.

Mr. Chairman, this concludes my prepared statement. I hope these comments will be helpful to the Committee in its deliberations on this important piece of legislation.

[The following information was subsequently received for the record:]

FEDERAL MARITIME COMMISSION,
Washington, D.C.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This refers to your letter of April 7, 1977, by which you transmitted certain questions from Senator Schmitt relating to the hearings on S. 263 before your committee. Those questions and our responses thereto are as follows.

1. To what extent does your agency have a complete cross-referenced catalog of regulations by subject matter, by requirements and by impact upon consumers, businesses and other agencies of Government? Are they readily available for public use and Congressional reference after they have been promulgated? How do you detect overlapping or inconsistent regulations in your agency and between agencies?

The Commission's regulations are set forth in Part 500, Title 46, Code of Federal Regulations. The tables of contents incorporated therein set forth the various regulations by title and subject matter; otherwise, no cross-referenced catalog of such regulations exists. They are, of course, readily accessible to the public and the Congress. Regulations are promulgated only after formal public proceedings in which any agency may participate if it feels the proceeding will result in

overlapping regulation. As a practical matter, the Commission's legislative mandate is rather confined. The only possibility of overlapping regulation would be in the area of tariff filing where the Interstate Commerce Commission might be involved.

2. To what extent are you required to include economic impact statements with proposed regulations? How do you determine whether the benefits will exceed anticipated costs to consumers?

This Commission is not required to include economic impact statements with its proposed regulations. As indicated above, regulations are considered in formal, public proceedings conducted in accordance with the Administrative Procedure Act. During the course of a proceeding, all interested persons are invited to participate and thereby given the opportunity to raise the issue of anticipated costs/benefits. The Commission also, necessarily, must weight the benefits/costs issue in determining whether or not to issue a final regulation.

3. To what extent do you measure paperwork impact of regulations?

As in the case with 2. Above, the impact of paperwork must be considered in deciding whether to issue final regulations. Beyond this, there is requirement for advance clearance of any reporting requirement by the General Accounting Office, as explained more fully in response to question No. 7, below. The principal thrust of this review is to prevent duplicative reporting requirement among federal agencies.

4. To what extent do you determine the effect regulations will have on the courts' workload? Chief Justice Burger recently recommended "judicial impact" statements with new laws. What do you think?

Chief Justice Burger's comments, of course, were directed at proposed legislation, while Commission regulations are designed to implement statutes in being. To the extent that our statutory mandate so dictates, regulations would have to be promulgated irrespective of their potential impact on the courts. Insofar as the Chief Justice's proposal is concerned, it is presumed that this would be one of the factors considered by the Congress in its deliberations on proposed legislation.

5. Are you preparing to conduct zero-based budget reviews of your programs?

We plan to conduct a zero-based budget review of agency programs in connection with the development of our fixed year 1979 budget. This review will be made in accordance with guidelines now being developed by the Office of Management and Budget. Pending receipt of these guidelines, we are going ahead with what we believe to be the general concept of zero-based budgeting.

6. What is your view of the "sunset" legislation calling for a phased 5-year schedule of review of federal program functions? Do you favor a "sunset" for agency rules and regulations?

As we understand current "sunset" legislation proposals, such as S. 2, now before the Senate Intergovernmental Relations Subcommittee, all federal programs would expire every five years unless, after review, Congress took some positive action to renew those programs.

The Federal Maritime Commission opposes the concept of "sunset" legislation for two very practical reasons. First, such legislation would inject a significant degree of unpredictability into the maritime industry regulated by this Commission. This industry is very capital intensive and needs a stable environment to attract investment in the necessary capital assets. The threat of an upheaval, every five years, of the regulatory system under which these carriers, terminals and other persons operate, would discourage long-term investment and create a demand for higher return on short-term investment.

Moreover, shippers and consignees of cargo in the U.S. foreign and domestic offshore trades must be able to plan their export and import business with reasonable certainty. The threat of removal of the regulatory system under which their shipments are now made would prevent any such long-range plans. For example, a U.S. corporation that may wish to establish a manufacturing plant in Puerto Rico for goods to be sold in the United States would face a substantial, additional risk from legislation that may eliminate rate regulation in the U.S.—Puerto Rico trade.

Second, the review procedure that would take place every five years under "sunset" legislation would consume a tremendous amount of manhours. Congress, the agencies involved, and the industry affected would spend enormous amounts of time and money in researching, analyzing, testifying and arguing

about the merits and demerits of various programs. In our opinion, a far more efficient and cost-effective approach is found in the existing oversight authority to Congress, coupled with the current administration's zero-based budget methodology. This approach achieves the review contemplated by "sunset" legislation without the dampening effect upon the economy that we foresee with automatic expiration of programs, rules or regulations.

7. There have been several bills and amendments to bills providing for a form of Congressional veto over proposed agency regulations. The budget reform law prescribes Congressional action in the form of recissions and deferrals of proposed impoundments. Please comment on the idea of applying the budgetary process to your agency's proposed regulations, that is, submitting major rules and regulations (i.e., regulations having a substantial impact on consumers and businesses as opposed to minor regulations relating to internal agency matters and with little or no impact on outsiders) to the Congress for review before they go into effect.

Most of the bills providing for congressional review of agency rules and regulations have provided that a proposed rule or regulation must be submitted to both houses of Congress simultaneously with publication in the *Federal Register*, and that the rule or regulation can be vetoed by resolution of either house of Congress within 60 days after such submission.

Rulemaking proceedings conducted by this Commission are currently governed by the existing provisions of the Administrative Procedure Act (5 U.S.C. § 500, *et seq.*), section 43 of the Shipping Act, 1916 (46 U.S.C. § 841a), and our Rules of Practice and Procedure (46 CFR § 5022.51, *et seq.*). The procedures outlined therein are carefully designed to afford interested members of the public the opportunity to participate in such proceedings through public hearings. While these hearings are important to insure that a variety of views on a proposal will be submitted for consideration by the Commission, they also assure the development and availability of a public record. Such a record not only provides a basis of comparison between an initial rule and a final rule, by detailing and justifying any distinctions between the two versions, but serves also as a basis for judicial review.

No such due process protection would be available under the suggested congressional veto power. We believe that those provisions which would empower either House of Congress to disapprove a final rule could subject the administrative rulemaking process to extensive political pressure from lobbying groups, that might or might not have participated in the same proceedings at the administrative level. In addition, the proposals fail to offer the safeguards currently available in connection with legislation; specifically, consideration and passage by *both* Houses of Congress, and approval or veto by the President. Whereas administrative agencies are required to justify, in a public forum, their proposed rules and any revisions made thereto, these proposals provide for no similar justification in the event of Congressional dissapproval of a rule. Thus, parties dissatisfied with the outcome of a rulemaking proceeding would have a second opportunity to attack the proposed rule, or the agency's decision to withdraw it, without adherence to existing procedural safeguards. Such procedures have been designed, in part, to protect the public from undue influence of "Special Interest" considerations on agency action in rulemaking proceedings.

Congress has established independent regulatory agencies in response to the need for expertise in dealing with complex legal and factual issues relating to national policies with respect to various segments of the public interest. Quasi-legislative authority has been delegated to these agencies for the purpose of administering and enforcing such time-consuming, highly technical work. The Congressional veto proposals would thwart these purposes, by requiring one or both Houses of Congress to become involved unnecessarily in complex agency rulemaking proceedings at the expense of far more important national matters. Moreover, the time limitations specified in the bill would not, in most cases, afford the Congress adequate opportunity to achieve the type of review needed for an informed, well-reasoned analysis of such rules. Months of preparation at the staff level are required before a rule is published for comment by this Commission. After comments are submitted, reviewed, and analyzed, a rule may be revised, republished for further comment, and then promulgated by the Commission in final form. It is at this point, presumably, that the proposals would require the rule to be transmitted to Congress for review. The appropriate Com-

mittees of the House and Senate would then have 60 days, at most, to review and report a Resolution disapproving or directing reconsideration of such rule, or it would become effective as promulgated. Assuming the members of these Committees had the necessary expertise for meaningful review, it is inconceivable that they could accomplish such an undertaking within this deadline, given the considerable volume of rules promulgated by the Executive branch and the various independent regulatory agencies.

Currently, rules promulgated by this and other government agencies are subject to review by the courts, who may set aside the agency's rules if they are found to be arbitrary or capricious, or to exceed the authority granted the agency by Congress. In addition to this judicial review procedure, certain rules promulgated by independent regulatory agencies are subject to review by the Executive branch. Pursuant to Section 409 of Public Law 93–153, 87 Stat. 593, that added a section 3512 to chapter 35 of title 44, United States Code (the Federal Reports Act of 1942, as amended), the General Accounting Office must conduct advance clearance reviews of new or revised proposals by independent regulatory agencies to collect information from ten or more persons. This statute also requires that the General Accounting Office conduct general reviews of information-gathering practices of independent regulatory agencies with a view toward avoiding duplication of effort in, and minimizing the compliance burden imposed by, such practices. These requirements have been implemented by the General Accounting Office in 4 CFR § 10 and affect virtually any rule promulgated by this agency that would impose a significant burden on the regulated maritime industry. Thus, the rules subject to this review procedure would appear to be generally the same as those proposed to be subjected to Congressional veto.

In view of the existing requirements of the Administrative Procedure Act, the opportunity for judicial review, and the requirements for clearance of the General Accounting Office, another level of review by both houses of Congress would, in our opinion, be superfluous. Certainly it would delay the rulemaking process and would hinder current administration and congressional efforts to streamline the federal bureaucracy.

If, upon review of these responses, there are any additional questions, please let us know and we will attempt to answer them.

Sincerely yours,

CLARENCE MORSE,
Vice Chairman.

Senator SCHMITT. Mr. S. John Byington, Chairman of the Consumer Product Safety Commission.

I understand your testimony basically supports the bill and it will be included in the record.

If it is acceptable to you we will accept your testimony and I will ask you to summarize in answer to one question the circumstances of your Commission that gives you leave to support almost the entire bill, where other agencies do not. Would you clarify that for me?

STATEMENT OF HON. S. JOHN BYINGTON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Mr. BYINGTON. I would. I think it is fair to say that our testimony indicates general support for the entire bill and the various provisions in it.

Our statement also points out a few areas we think the committee ought to address as it proceeds. I would like to touch on a couple of those and consider that a summary.

In the area of rule codification and law revision, we support that and we have already completed such action relevant to the Flammable Fabrics Act. We touch on the interrelationship of that section to agency funding and other such aspects. If we are going to move forward with additional regulatory reform or sunset or any other type

of similar legislation, whatever timing is proposed in this section ought to have some relationship to other cycles.

The concern that the Commission expresses and I would express as the chief executive officer—like other statements that have been made before me—relates to the amount of time and effort that it is going to take to do this type of job correctly. If we are working within different time frames, where you have one time frame for rule codification and another for law revision and still another time frame where you talk about the justification for the whole agency, you will spend a lot of your time dealing with codification, revision and justification and very little time regulating.

You can achieve what you are looking for and still have it put together on a sequential basis.

Senator SCHMITT. By that are you suggesting that it would be appropriate as a first step to ask each Commission to lay out what they think is an organization schedule for a recodification effort, rather than going immediately to the recodification effort?

Mr. BYINGTON. It is important to recodify both the regulations and the law. I think though if we are going to move within the next few months or year into some type of system where every one of the regulatory agencies goes through an intensive review, that it would be appropriate to do our recodification of our rules and our laws concurrent with our overall justification, so that we do the whole job at one time. That would also be an appropriate time to consider what laws ought to be changed or abolished and what rules should be changed or abolished in light of the justification. It is most appropriate for a committee to be asking questions along the lines of what are you doing, why are you doing it and should you continue to do it. Rather than do that at one point and come back a year or two later and look at an overall justification, I think it should be coordinated.

In terms of the openness provisions of S. 263 we have no problem there.

In terms of section 9, the conflict of interest section, I personally don't have a problem and neither does the Commission. I do think the committee has to look at the difference between conflict of interest and self-enrichment. We have under our statute, section 4(g)(2) forbidding certain CPSC employees from accepting employment for 1 year with any manufacturer subject to our jurisdiction. I believe that we have to look at conflict of interest and the self-enrichment concerns separately.

In terms of 11(d) where we are talking about the 3 years for the Chairman, I have a lot of thoughts on that subject which we could discuss at an appropriate time. The Commission's attitude is in terms of our statute which gives a 7-year term of office to the Chairman. I think it is fair to say that the Commission believes that the 7-year term is reasonable and we don't necessarily advocate a change.

If Congress wants to change it—to reduce it, it would be fair to say that all of the members of our Commission would think that every 4 years would be more appropriate than 3.

Personally, I think there are a lot of ways to look at the matter. If we are dealing here with some of the criticisms of regulatory agencies then I think we have to look at more than just whether or not 3 years is an appropriate time in which to operate.

I do think there is some rationale for a reasonable term for a Chairman in light of his responsibilities as a chief executive officer and manager.

There are a number of ways to look at it, including setting it at 3 or 4 years, or leaving it at 7 years or changing all of the Commissioners' terms to 5 years and thereby rotate on a 5-year basis.

Senator SCHMITT. Does your statement treat this in more detail or would you like to submit more?

Mr. BYINGTON. I would be happy to submit my recommendations as to other alternatives for you to consider.

Lastly, in the areas where we already have experience, such as petitions and concurrent submissions and litigation, we have no problems. We think the 120 days is a reasonable time period. We personally think it is also proper that where agencies don't take actions, that petitioners do have recourse. Not taking action has always been a way out for government agencies that should be eliminated.

We particularly like some of the language in this bill as it relates to judicial review. Since we are not in this section, because we already deal with petition in a similar manner, we would like consideration in applying some of that language to our statute. Frankly, we like this language better.

Lastly, we support section 7 and, in fact, we would go further in terms of civil litigation. We strongly support statutory authority to allow regulatory commissions to handle their own civil litigation.

Senator SCHMITT. Is part of the reason you feel differently than the other commissions that you are a newer group and have already had to live under some of the provisions that are contained in S. 263?

Mr. BYINGTON. I think it is true of the 10 general provisions of the Statute, sections 3 through 12, we already have 5 of them. And I think we are proof that you can stay alive and operate.

Senator SCHMITT. But you started that way.

Mr. BYINGTON. To a certain extent that is also true. But we picked up a couple of them in our amendments of last year. Actually we picked up three of the five last year.

In terms of where the primary conversation has focused so far today, on the rule codification and law version, some of the other agencies have more problems than we do. Many of them have been in existence for 40 and 50 years, and they may have a larger task in this regard than we would have. On the other hand we did inherit under the transferred acts additional legislation which has been in existence for 20 years or so. So it is not totally accurate to suggest that since our Commission is only about 4 years old next month that our job is that much easier.

Within the transferred acts we have 10 to 20 years of previous regulations that we would have to codify and at least five states that we would have to consider for revisions and consolidation.

But we do believe, and I personally have spoken out on this a number of times, that we have a responsibility to review our own rules, regulations and legislation.

Yet I would support some of my fellow chairmen who preceded me here this morning in pointing out that it really is not an easy task.

Our Commissioners have agreed to take a look at what kind of problem we would be facing if we were to consolidate our transferred acts, that is, Hazardous Substances Act, Poison Prevention Packaging Act, Flammable Fabrics Act, and Refrigerator Safety Act, that came to us under the Consumer Product Safety Act. I, for one, have been on record that we ought to try consolidation. Our office of general counsel has prepared the first draft of what we call a ramifications memorandum as to what is entailed.

The fact of the matter is, it is a monumental undertaking. It is not only a monumental undertaking on the part of the Commission, but also by the Congress to make sure that the various provisions that we want to keep are maintained and to see that there isn't a detrimental effect on the regulations already in the marketplace.

We do agree it ought to be looked at. We think that the section that deals with advisory committees ought not necessarily be mandatory. There ought to be flexibility, both in using the administrative conference, other experts, and everything else that is available. Another advisory committee may not be necessary.

There are also a number of ways of addressing the problem. You may want to address it on an act by act basis or through a grouping of the regulations in some way.

Senator SCHMITT. Very good. We appreciate your testimony. You, like others, will be getting a few questions from me on some generic issues.

And we appreciate, again, your coming by.

Mr. BYINGTON. Thank you very much, and I will submit for the record our thoughts on there other questions.

[The statements follow:]

STATEMENT OF S. JOHN BYINGTON, CHAIRMAN, CONSUMER PRODUCT SAFETY COMMISSION

Mr. Chairman, It is a pleasure to appear before this Committee today to present the Consumer Product Safety Commission's comments on S. 263, the Interim Regulatory Reform Act of 1977. As the Committee is aware, several of the provisions proposed for other independent regulatory agencies covered by the bill are presently applicable to this Commission. First, I would like to direct our comments to those proposals that would affect CPSC. Next I will discuss those provisions that already apply to CPSC and are proposed to be extended to other agencies.

The provisions requiring rule recodification and law revisions are, in the Commission's view, closely related and should be considered together. We agree that an examination and reassessment of the statutes administered by the Commission, and the rules and regulations issued to implement those statutes, is desirable. A concise and rationally organized set of statutes and rules aids the agency in administering its authorities. Equally important, it enables the regulated interests to understand precisely what is expected of them and informs those affected, and the public in general, of what the Commission is doing to ensure that its laws are being enforced fairly and effectively.

We have and will continue to take affirmative steps to bring order to the scheme of regulations that we are charged with enforcing. The Commission, on December 30, 1975, published in the Federal Register (40 FR 59884) a complete recodification and transfer of regulations under the Flammable Fabrics Act, including flammability standards, policy statements ind interpretations previously issued by the Federal Trade Commission, the Department of Commerce, the Department of Health, Education, and Welfare, and the Commission.

Regarding law revision, the Commission is considering whether to recommend Congressional action to consolidate into a single Consumer Product Safety

Act the acts transferred to the Commission including the Federal Hazardous Substances Act, the Poison Prevention Packaging Act, the Flammable Fabrics Act and the Refrigerator Safety Act. A preliminary examination of the implications of such a consolidation has been prepared. This will assist the Commission in deciding whether the apparent advantages of such consolidation warrant the extensive resource investment necessary to draft a bill.

The Commission believes that its present efforts are substantially in accord with the requirements of section 4 of S. 263 and we support the intent of that provision. We have reservations, however, about the provision of section 4 that would require the establishment of an Advisory Committee on Law Revision. That provision should, in our view, be optional rather than mandatory, in order to permit the use of qualified Commission personnel. Also in the interest of economy and coordination of law revision with rules recodification, an expanded role for the Administrative Conference might be preferable to individual advisory committees for each agency.

Further, the Commission that efforts to recodify rules and revise laws should, because of their interdependence, be accomplished at the same time. With different schedules for rules recodification and law revision, confusion could result. More fundamental, the provisions of S. 263 might duplicate other efforts proposed for general regulatory reform. As you know, a variety of regulatory and general government reforms, including proposals for automatic abolishment of agencies, are being considered by the Congress. We believe that reform of statutory authorities, determination of funding levels, and the very existence of agencies are interdependent. In the interest of approaching the problem systematically, the entire area should be viewed as a whole. The Committee may, therefore, wish to consider extensive revision and recodification of regulations and revision of statutes in the broader context of regulatory reform.

The Commission has always been committed to openness and we support the provision of section 6 of S. 263 regarding Congressional access to information. Our Procedures for Disclosure or Production of Information under the Freedom of Information Act (16 CFR 1015.12, 42 FR 10493, February 22, 1977), provide that duly authorized committees of Congress shall have access to all records of the Commission.

The Commission supports section 9 of the bill. The avoidance of conflicts and apparent conflicts of interest is crucial for public confidence in government. The Consumer Product Safety Act already forbids top CPSC employees from accepting employment with any manufacturer subject to the Act for one year after leaving CPSC.

Section 11(d) of the bill would limit the term of the Chairman of the Commission to three years, while leaving unchanged the seven-year term of a Commissioner. Thus the Chairman would serve in that capacity for only a portion of his or her term as a Commissioner. Under the present provision of the Consumer Product Safety Act, as you know, the Commissioner appointed by the President as Chairman serves in such capacity for his or her entire term.

The provision appears to conflict with the original intent of the Consumer Product Safety Act for insuring the independence of the Commission. That was the principal goal of the Congress in enacting the present section 4(a) of the Act. Legislative history makes clear that the Congress was dissatisfied with having chairmen of regulatory agencies serve at the pleasure of the President. The House committee stated:

"The committee has incorporated several provisions which depart from and improve upon traditional agency practice. Because the Commission's Chairman is designated as the principal executive officer and assigned special powers to control the operation of the agency, the committee does not believe that the Chairman should serve at the pleasure of the President. Accordingly, section 4(a) qualifies tre presidential appointment powers by requiring that the Charman, when designated as such by the President, shall continue to serve as Chairman until the expiration of his term of office as a member of the Commission. Thus, if the President designates a member of the Commission to serve as Chairman at the time of his appointment to tht Commission, that person shall continue in office as Chairman for his full seven-year term on the Commission. The President would not be empowered to designate some other Commissioner to serve as Chairman within this period. Also, if the seven-year term of office runs into another administration, the incumbent President would not

be able to remove the Chairman and replace him with his own designee." H.R. Rep. 92–1153, 92d Cong. 2d. Sess. (1972) at 29 (Committee on Interstate and Foreign Commerce)."

We recognize that section 11(d) of the bill does not propose that chairmen serve at the pleasure of the President, but shortening the term to three years would diminish the independence intended under the CPSA.

Mr. Chairman, since the Commission has been in existence less than four years, our experience with the potential seven-year term for the Chairman is inadequate to draw definite conclusions. There are certainly distinct advantages to such a term, both in insuring independence of a regulatory agency and in insuring a greater measure of stability, especially in an agency such as CPSC whose projects are inherently long term. One could argue persuasively for a shorter term, such as four years, and the greater accountability that it affords. Our Commissioners each have various opinions as to which of numerous approaches would be most beneficial. However, we see little that would be gained by a term of only three years since it would provide little additional accountability over a four-year term and would increase the periods of instability inherent in a change in leadership.

Mr. Chairman, I would be pleased to answer any questions the Committee may have regarding my own personal views on this at the end of the Commission's testimony.

The provisions of S. 263 with which the Commission presently has experience include those sections dealing with timely consideration of petitions, concurrent submission of budget requests and legislative proposals to Congress and the Office of Management and Budget, and litigation authority vis-a-vis the Department of Justice.

The Commission supports the concept of section 5 of the bill that would require the timely consideration of petitions. An agency that is charged with regulating in the public interest should be responsive to the public. Our experience indicates that 120 days is a reasonable time for an agency to respond to a petition.

The Commission would, however, suggest several revisions in the petitioning process. First, the provision should include a statement of the grounds for granting or denying a petition. The Commission, in issuing Interim Procedures for Petitioning under section 10 of the Consumer Product Safety Act (41 FR 43126–43129) described the major factors for deciding petitions. Those are based on the language of the Act, the legislative history and other considerations regarding the relative priority of the risk of injury associated with the product and the resources available for rulemaking activities respecting that risk of injury. While the nature of the considerations would differ with the agency mission, a general statutory expression of relevant considerations in deciding on a petition would, in our view, be helpful. In conjunction with such a statement, the provision for judicial review of an agency decision should state that the court will take into account the factors that the agency considered in its decision.

While the Commission believes that the petitioning provision could be revised that way, an aspect of the judicial review procedure proposed for other agencies appears to be more workable than the procedure presently applicable to this Commission. The existing Consumer Product Safety Act provides that review of a petition decision will in all cases take the form of a de novo proceeding. The proposal in S. 263, on the other hand, provides that where a record before the Commission exists, review is limited to that record, and a de novo proceeding is required only where the agency failed to act. In either case, under S. 263, the the standard of review is whether, among other things, the agency action was arbitrary and capricious. The Commission would favor this provision over the existing language of the Consumer Product Safety Act.

We believe that concurrent budget and legislative submission, as is presently provided for in the Consumer Product Safety Act and has proposed to be applied to other agencies by S. 263, is appropriate for independent agencies. The drafters of the Consumer Product Safety Act concluded that the provision was essential to insulate the agency from political pressures and to enable Congress to learn directly the agency's views on important issues. We think that conclusion remains valid today. We, therefore, support section 6 of the bill.

The Commission concurs in the intent of section 7 of S. 263 that would grant a degree of independence from the Department of Justice to other regulatory

The Commission has not attempted, beyond the efforts outlined above, to establish a catalog of regulations. We will, however, continue to conduct surveys and other programs to determine the level of consumer and industry awareness of our regulatory requirements and activities in general. We wish to assure that all affected interests are informed about and understand our efforts to protect the public from the unreasonable risk of injury associated with consumer products.

Because of the relatively small number of regulations issued by the Commission to date, we have not perceived overlap or inconsistency among our own regulations. In areas where the Commission has potential jurisdictional overlap with other agencies such as regulaton of fluorocarbon propellants n aerosols, we have endeavored, through the establishment of interagency agreements and task forces, to coordinate our efforts so as to avoid the problem of overlapping or inconsistent regulations.

Question 2. To what extent are you required to include economic impact statements with proposed regulations? How do you determine whether the benefits will exceed anticipated costs to consumers?

Answer. Section 9(c)(1) of the Consumer Product Safety Act (15 U.S.C. 2058(c)(1)) requires the Commission to make certain findings for inclusion in consumer product safety rules, including findings regarding: "(C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and (D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety."

Further, the Commission has formally adopted benefit and cost as one of its criteria for setting project and program priorities. While the opinion of economists may differ as to what constitutes sufficient and relevant economic data, with respect to regulatory action, the Commission during its proceedings must by law make a judgment that its staff has adequately presented and analyzed issues relating to the econimic impact of its actions.

The Commission is, however, concerned that mandatory procedural requirements regarding the preparation of draft and final cost/benefit assessments, such as have been proposed in several bills currently pending in the Congress, would impose additional burdens and delay on the Commission's regulatory development efforts without adding substantially to the current efforts to prevent the imposition of unreasonable or excessive costs on the public. Further, requiring consideration of the economic consequences of agency action to take the form of a formal cost/benefit analysis may result in controversy and produce misleading documents. In the regulation of safety, controversy inevitably flows from the attempt to quantify essentially unquantifiable benefits. The value of a human life is a case in point. A cost/benefit analysis may also be misleading in that its provision of a "bottom line" figure ignores the difficult questions involved in determining the need for, and probable effectiveness of, mandatory regulation.

Question 3. To what extent do you measure paperwork impact of regulations?

Answer. Providing an assessment of the projected paperwork impact of a regulation, while a landable goal, could prove impracticable or impossible for this Commission to accomplish with regard to consumer product safety rules or other safety standards. The recordkeeping required of a manufacturer in connection with a rule consisting of performance requirements for a product could have a varying and essentially unpredictable impact on the firms affected, depending on the size of the firm, the sophistication of the firm's quality control system or its existing recordkeeping practices. Where, on the other hand, a rule consists of recordkeeping requirements or requirements that a manufacturer provide the Commission with technical data, (e.g. section 27(e), Consumer Product Safety Act, 15 U.S.C. 2076(e)), requiring consideration of the projected paperwork burden of the rule would, in the Commission's view, be appropriate and would, in addition, enable the Commission to better evaluate the impact of the rule and the prospects for compliance by affected parties. Regardless of whether an estimate of the paperwork burden is contained in the proposed rule, the Commission would consider any public comments regarding such burden in its determination to issue the final rule.

Question 4. To what extent do you determine the effect regulations will have on the courts' workload? Chief Justice Burger recently recommended, "judicial impact" statements with new laws. What do you think?

Answer. The Commission does not, at present, make a formal determination regarding the "judicial impact" of its regulations. While it appears obvious that the complicated system of administering justice makes the process of such prediction uncertain, the Commission believes that it is reasonable to require the Congress to at least be aware of possible consequences on the courts of legislative actions.

The Commission, in addition, supports current efforts to reduce the burden on the courts. The Commission has recently proposed amendments to certain of the statutes which it administers to provide a system of administrative imposition of civil penalties, in accordance with a recommendation of the Administrative Conference of the United States. This proposal would eliminate the district court *de novo* appeal of the administrative determination presently required in civil penalty cases. (see sections 3 and 4 of S. 709, currently pending before the committee).

Question 5. Are you preparing to conduct zero-based budget reviews of your programs?

Answer. The Commission's FY 1978 Congressional Budget Request, at the request of the House Appropriations Subcommittee and staff representatives of the Congressional Budget Office, was submitted in January, 1977 in the Zero-Base Budgeting (ZBB) format. Our budget submission was intended to be a pilot project amend at determining the feasibility of implementing ZBB in all Federal agencies. Although evaluation of the process of ZBB is on-going, implementing ZBB in the Commission has been interesting and rewarding in that it has resulted in the involvement of managers at all levels within the Commission; has afforded the program managers an opportunity to establish workload factors, effectiveness and evaluation measurements for their programs; and has returned decision making as it relates to the assignment of resources and establishment of alternatives to the program manager.

Question 6. What is your view of the "sunset" legislation calling for a phased 5-year schedule of review of federal program functions? Do you favor a "sunset" for agency rules and regulations?

Answer. The Commission supports the concept of "sunset" legislation. As Chairman Byington stated in his testimony on S. 263, the Commission believes that reform of statutory authorities and the regulations issued under those authorities: the determination of funding levels through the process of ZBB; and the evaluation of the continued existence of programs and entire agencies, through the "sunset" concept are interrelated. The Commission's view therefore, is that the process of "sunset' review, particularly in the case of the Commission and other regulatory agencies, should focus on the entire regulatory scheme, rather than on only rules or regulations.

Question 7. There have been several bills and amendments to bills providing for a form of Congressional veto over proposed agency regulations. The budget reform law prescribes Congressional action in the form of recissions and deferrals of proposed impoundments. Please comment on the idea of applying the budgetary process to your agency's proposed regulations, that is, submitting major rules and regulations (i.e., regulations having a substantial impact on consumers and businesses as opposed to minor regulations relating to internal agency matters and with little or no impact on outsiders) to the Congress for review before they go into effect.

Answer. The Commission is presently required by section 27(1) of the Consumer Product Safety Act, as amended in 1976 by Pub. L. 94-284 (15 U.S.C. 2076(1)), to transmit to the committee and the House Committee on Interstate and Foreign Commerce each proposed consumer product safety rule and other safety regulation (with certain enumerated exceptions) at least 30 days prior to promulgation. The intent of this provision is to permit the Congress to review the proposed Commission action and take whatever action it deems appropriate.

The establishment of formal congressional veto procedures, however, would result in delay in the process of rulemaking by this Commission and would create uncertainty, particularly among industry, with respect to the final outcome of Commission proceedings to establish certain rules and regulations under several of the statutes administered by the Commission. Specifically,

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The establishment of formal congressional veto procedures, however, would result in delay in the process of rulemaking by this Commission and would create uncertainty, particularly among industry, with respect to the final outcome of Commission proceedings to establish certain rules and regulations under several of the statutes administered by the Commission. Specifically,

with respect to delay, current proposals for Congressional veto would generally impose a period of 60 to 90 days in which rules would be, in effect, suspended pending Congressional committee and floor action. If at the end of 60 days after promulgation, a resolution of disapproval or for reconsideration has not been reported or the committee considering the resolution has not been discharged from consideration, the rule would go into effect. If, however, at least one committee considering the resolution has reported or been discharged from consideration of the resolution or either House has adopted such a resolution, the effective date of the rule would be delayed an additional 30 days. Such delay could lengthen the process for issuance of consumer product safety rules under the Consumer Product Safety Act; regulations for the administration and enforcement of the Flammable Fabrics Act; and regulations issued pursuant to 5 U.S.C. 553 to declare a toy, or other article intended for use by children, a hazardous substance under the Federal Hazardous Substances Act, as well as all rules issued by the Commission, if the Commission determines for good cause that an immediate effective date is in the public interest.

With regard to uncertainty, affected parties. including industry, would be unable, for a period of at least 60 days, to determine within any degree of certainty the final outcome of a Commission proceeding to issue a rule. For industry, this would make rational planning of, for example, changes in production methods impossible. The possibility of adoption of a resolution for reconsideration with the renewed opportunity for public participation could further compound this uncertainty by altering the substance of a rule after industry resources have been committed.

The Commission can, in addition, foresee the possibility that certain interested parties would be less energetic in presenting and advocating their positions before the Commission knowing that they would have an additional opportunity to influence the course of the proceeding before the Congress. The record before the Commission would, therefore, become less significant; and, consequently the process of judicial review, which is based on an examination of the record, would be adversely affected.

Furthermore, there is no assurance that constituent pressures and contacts with members would be open to the public or that the congressional determination would be based on "substantial evidence" or on equivalent, as is required of consumer product safety rules and other regulations established by the Commission.

More fundamentally, the Commission believes that establishment of congressional veto procedures disregards agencies' specialized expertise in technical and complex areas and appears to run contrary to the established principle followed by the courts, when reviewing administrative actions, to defer to such expertise.

Senator SCHMITT. If there is no further business, we will adjourn.

[Whereupon, at 1:25 p.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

AMERICAN TRUCKING ASSOCIATIONS, INC.,
Washington, D.C., April 15, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Russell Senate Office Building, Washington, D.C.

MY DEAR MR. CHAIRMAN: This is to submit our views on S. 263, the "Interim Regulatory Reform Act of 1977, which was the subject of hearings before your Committee on April 4 and 5, 1977, and on S. 547, the "Surface Transportation Procedural Reform Act of 1977," which is also under consideration by your Committee. We are particularly interested in the procedural reforms proposed in these two bills as they relate to the Interstate Commerce Commission.

The American Trucking Associations, Inc., by action of its Executive Committee in February, 1976, committed itself to the elimination of "regulatory lag" and in a petition filed with the Interstate Commerce Commission on March 4, 1976, requested that the ICC impose the same stringent time limits for processing motor carrier proceedings, which were mandated by Title III of the Railroad Revitalization and Regulatory Reform Act of 1976 for processing rail proceedings.

Specifically, we asked that the Commission impose the following time limitations:

1. To complete all evidentiary proceedings within 180 days following assignment to an administrative law judge, individual Commissioner, employee board or panel of the Commission;
2. To issue an initial decision within 120 days after completion of evidentiary proceedings.
3. To act on appeals from initial decisions within 180 days; and
4. To complete action on reconsideration of a Commission order within 120 days.

One of the reasons for the Commission's failure to adopt these limitations is the lack of adequate manpower to meet the increase in workload. It is our real fear that, since the Commission is bound by statute to process rail proceedings in an expeditious manner, proceedings involving motor carriers will not be accorded timely consideration.

For these reasons, we believe it in the best interests of our national transportation system to correct the present inherent procedural inequalities created by the 4–R Act. Therefore, we heartily endorse Section 14(b) of S. 263 whereby the ICC would be required to grant or deny petitions for the commencement of a proceeding for the issuance, amendment, or repeal of a rule or regulation within 120 days of receipt. We also strongly favor the procedural reforms similar to our four requests listed above, which are contained in Section 3 of S. 547.

In line with the above proposals, we are concerned over the budgetary ceilings for the ICC contained in Section 14(i) of S. 263 for 1978 and 1979. It is precisely because of the practical problems of staff and other resource limitations that the ICC feels constrained from adopting more stringent time limitations on processing motor carrier proceedings before it. The unrealistic budget ceilings which would be imposed by Section 14(i) of S. 263 would negate the salutary effects of these procedural reforms by lessening the quality of review.

We ask that this letter be made a part of the hearing record on S. 263 and S. 547.

Sincerely,

BENNETT C. WHITLOCK, Jr.,
President.

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
Stamford, Conn., April 14, 1977.

HON. WARREN G. MAGNUSON,
Chairman, Senate Commerce, Science and Transportation Committee,
Dirksen Senate Office Building, Washington, D.C.

DEAR CHAIRMAN MAGNUSON: The National Industrial Traffic League wishes to take this opportunity to comment for the official record of hearings on S. 263, the Interim Regulatory Reform Act of 1977 which was the subject of a hearing before your committee on April 4, 1977, as it applies to the ICC, CAB, and FMC.

The League is a voluntary organization of 1800 shippers, shippers' associations, boards of trade, chambers of commerce and other entities concerned with rates, traffic and transportation services of all carrier modes. It is the only shipper organization which represents all types of shippers nationwide. Its members include large, medium and small shippers who use all modes of transportation and who ship all types of commodities. The League is not a panel or committee of a trade group, or a spokesman for a particular commodity or transportation point of view, and does not permit carrier membership.

The League's primary concern is to provide for the nation and all its shippers a sound, efficient, well-managed transportation system, privately owned and operated.

To arrive at positions reflective of the broad range of shipper interests within the League, the League membership at is annual and special meetings considers, debates and votes on actions to be taken. During its seventy years of existence, the League has frequently been the spokesman for the nation's shippers before Congress on proposed transportation and regulatory reform legislation.

The Interim Regulatory Reform Act of 1977 as introduced by you, Mr. Chairman, and Senator Pearson would affect seven regulatory agencies including the Interstate Commerce Commission, the Civil Aeronautics Board, and the Federal Maritime Commission. Provisions of the bill include: requiring the various regulatory agencies to recodify their rules and regulations within definite time periods, requiring timely consideration of petitions, simultaneous budget transmission to the Office of Management and Budget and the Congress, and providing for fixed authorization of appropriations for the agencies.

Section 4 of S. 263, entitled "Law Revisions" requires each agency to revise and codify all applicable statutes and case-law under which it functions and to recommend legislation which would better achieve the purpose for which the agency was established. Final action to facilitate Congressional consideration of matters relating to regulatory reform and each proposed revision and recodification "shall be designed to clarify, simplify and improve the applicable law, both substantively and technically."

The League supports the provisions of Section 4 as applicable to ICC, FMC and CAB.

Section 5, is entitled "Timely Consideration of Petitions."

This section:

A. Would give agencies 120 days to grant to deny petition for commencement of proceedings. If granted, the agency must commence proceedings "as soon thereafter as practicable." If denied, the agency must publish its reasons in the *Federal Register*.

B. If petition is denied or the agency doesn't act in 120 days—petitioner may, within 60 days after order or expiration of 120 days, commence action in Federal Court for an order directing the agency to commence action. Petitioner must demonstrate to the court that his action "is necessary," and that failure to act ". . . will result in the continuation of practices which are not consistent with the public interest or in accordance with the act."

The League strongly endorses Section 5 which now applies to the railroads. Under the League's "even-handed" treatment position for all modes of transportation, the members favor expanding it to other transportation modes.

Section 6, Congressional Access to Information is also strongly favored by the League as it applies to transportation regulatory agencies.

This section has three provisions. The first addresses Budget Transmissions to Congress. It says that when an agency submits budget estimates, requests or

information to the President or Office of Management and Budget, it shall concurrently transmit a copy to the Congress.

The second provision deals with "Legislation Recommendations to Congress." This provision states that when an agency submits legislative recommendations, testimony or comments on legislation to the President or Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress.

The third provision, is entitled "Congressional Information Requests" and provide that agencies must respond in 10 days to requests for documents and information from Congressional Committees.

The League strongly favors the provisions under Section 6—Congressional Access to Information.

Finally, as to Section 3, "Rules Recodification," the following provisions apply:

A. Recodification proposal by agencies

Submit to Congress (and Administrative Conference of the U.S.) an initial proposal setting forth a recodification of all of the rules which such agency has issued and which are in effect or proposed, as of the date of the submission.

B. Recodification of rules and regulation procedure

Deadline	*Action required*
(1) Within 360 days; after enactment of Act.	Agency recodification proposal—to Congress and Administrative Conference of the United States.
(2) Within 480 days; after enactment of Act.	Administrative Confernce comments and recommendations—to Congress and agency.
(3) Within 570 days; after enactment of Act.	Agency final recodification proposal—must consider (2) above, as well as recommendations from other sources.
(4) 90 days after submission of final proposal.	Rules take effect.

Also under Section 3, Congressional committees shall examine, study and take appropriate action in initial and final proposals in exercise of their oversight responsibilities. A test of initial and final proposals would be published in the Federal Register with written comments invited. Finally, rules not recodified, would be cancelled. Recodification of transportation agency laws, rules and regulations has been proposed a number of times in the past. If Congress determines such a recodification is desirable, the League members will cooperate with the agencies in this effort.

Section 13, "Authorization of Appropriations," is opposed by the League.

This section provides for fixed amounts appropriated to carry out agency powers and duties for fiscal years ending September 30:

	1978	1979	1980
Interstate Commerce Commission	$59,850,000	$62,700,000	(1)
Civil Aeronautics Board	22,522,000	23,594,000	$24,666,000
Federal Maritime Commission	8,715,000	9,130,000	9,545,000

[1] Not named.

In summary, the League generally favors a number of provisions of S. 263 as applied to transportation regulatory agencies.

The League is a strong advocate for regulatory reform in the Interstate Commerce Commission, the Federal Maritime Commission and the Civil Aeronautics Board. League committees are studying other provisions in S. 263, and other pending transportation regulatory reform bills, and will submit further League comments as they are available.

Sincerely,

J. ROBERT MORTON,
President.

FEDERAL MARITIME COMMISSION,
OFFICE OF THE VICE CHAIRMAN,
Washington, D.C. April 15, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Dear Mr. CHAIRMAN: In response to your request of April 7, 1977, I am pleased to furnish this agency's estimates of the authorizing levels for the five years beginning with fiscal year 1978 for inclusion in S. 263, the Interim Regulatory Reform Act.

These estimates reflect a modest increase in administrative expenses, excluding an allowance for civilian pay increases which are usually covered by separate legislative action. The estimates are as follows:

Fiscal year:	*Estimated amount*
1978	$8,901,000
1979	9,150,000
1980	9,500,000
1981	9,800,000
1982	10,200,000

Sincerely yours,

CLARENCE MORSE,
Vice Chairman.

FEDERAL TRADE COMMISSION,
Washington, D.C., April 15, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

Dear CHAIRMAN MAGNUSON: This is in response to your April 7, 1977, letter to Chairman Collier, and my subsequent conversation with Mr. Merlis of the Committee staff concerning the Commission's authorization needs for the next five years.

We have reviewed our existing and projected funding requirements to prepare an estimate of the appropriate authorization levels for the next five years. This has been necessary because the Commission is engaged in very costly rulemaking activities in consumer protection, is contemplating rulemaking in its competition mission, and is simultaneously conducting a number of massive complex antitrust litigations. In addition, the recent rate of inflation and cost of the Federal pay raise indicates the need for substantially higher authorization levels.

Against this background, the following levels seem to be minimally adequate.

Fiscal year:	*Authorization level*
1978	$65
1979	70
1980	75
1981	80
1982	85

If we may be of additional assistance on this matter, please call us.

Sincerely,

R. T. MCNAMAR,
Executive Director.

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., April 15, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Senate Committee on Commerce, Science, and Transportation, Washington, D.C.

Dear CHAIRMAN MAGNUSON: The enclosed estimate of authorization levels for the Interstate Commerce Commission for the five-year period beginning with

Fiscal Year 1978 is forwarded in compliance with your request of April 7, 1977. As you will note, our projection anticipates an increase of approximately 13 percent per year in overall resource requirements. This anticipation is based upon the following assumptions:

1. A 5.5 percent inflation factor. This estimate was developed by averaging the anticipated increases based upon research performed with a model provided by Data Resources, Inc. As with all economic projections, the change in the overall environment could have a significant impact on the rate of inflation over the course of the next five years. Our specific analysis was measured by GNP deflator. This provided for an increase of 5.9 percent in 1978; 5.6 percent in 1979; 5.5 percent in 1980; 5.4 percent in 1981; and 5.2 percent in 1982. For balancing purposes, we have used the average figure of 5.5 percent for each.

2. An average increase in Government salaries of 5.5 percent per year. This figure is used inasmuch as it was the guideline under Phase 2 Economic Controls during the period of mandatory price and wage controls in the past administration. It is anticipated that this is probably a somewhat conservative figure.

3. A 2 percent increase in personnel per year. Although this Commission intends to make every effort to increase its efficiency and productivity in the performance of duties, we do expect that the institution of the Public Counsel function and the extension of the Commission's staff more deeply into overall proceedings will require some additional resources. While we hope to be able to reallocate internally, based upon improved budget techniques, some small increases will probably be necessary to support the new directions intended.

Our figures are all based upon the Fiscal Year 1978 budget request to Congress of $67,504,000 and 2,508 positions.

If there are any questions or if additional information is required, please contact me or the Acting Budget and Fiscal Officer, Mr. Michael Fontana, who is on 275–7827.

Sincerely yours,

A. DANIEL O'NEAL,
Chairman.

Enclosure.

INTERSTATE COMMERCE COMMISSION, ESTIMATED AUTHORIZATION LEVELS, FISCAL YEAR 1978–82

[Dollars in thousands]

	1978	1979	1980	1981	1982
Base	$67,504	$71,216	$80,474	$90,935	$102,755
Additional manpower costs	0	1,424	1,609	1,818	2,055
Civilian pay increases	3,712	3,917	4,426	5,001	5,651
Consumer price increases	0	3,917	4,426	5,001	5,651
Total authorization level	71,216	80,474	90,935	102,755	116,112
Total positions	2,508	2,558	2,609	2,662	2,715

ASSOCIATION OF AMERICAN RAILROADS,
LAW DEPARTMENT,
Washington, D.C., April 21, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Senate Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: On January 14, 1977, S. 263, the Interim Regulatory Reform Act of 1977 was introduced by Senator James B. Pearson. Principally, S. 263 deals with changes in procedures and practices of seven named independent regulatory agencies. Among other things S. 263 would (1) require each agency to prepare a recodification of all its rules and regulations, (2) assure the appropriate Congressional committee access to all agency documents, (3) permit an agency to represent itself in a civil action, (4) make it a federal crime to kill an officer or employee of any of the named agencies, (5) tighten conflict of interest rules for future employment of Commissioners, (6) authorize appointment of the Chairman of each agency by the President, with the advice and consent of the Senate, for a three-year term, and (8) authorize appropriations through September 30, 1979.

The only provision in S. 263 on which this Association will comment in this statement relates to the second of the eight objects listed above, namely, Congressional access to agency documents.

More specifically, § 14(c)(5) of S. 263 would amend § 17(15) of the Interstate Commerce Act (49 U.S.C. § 17(15)) by deleting the third sentence of § 17(15). Section 17(15) directs the Interstate Commerce Commission to submit railroad documents in its possession to the House and Senate Commerce Committees within 10 days of a request for such information. But § 17(15) does not encompass all documents in the possession of the Commission. The third sentence contains an exception to the general requirement and reads as follows:

"This paragraph shall not apply to documents which have been obtained by the Commission from persons subject to regulation by the Commission, and which contain trade secrets or commercial or financial information of a privileged or confidential nature."

The quoted language follows closely the language of the Freedom of Information Act (5 U.S.C. § 552) which provides generally that government agencies shall make agency rules, opinions, orders, records, and proceedings available to the public. But there are certain exceptions in the Freedom of Information Act to the broad access to agency materials. The one relevant here is "trade secrets and commercial or financial information obtained from a person and privileged or confidential." (5 U.S.C. § 522(b)(4))

The railroad industry requests that the confidential documents exception be continued and its proposed deletion by § 14(c)(5) of S. 263 be, itself, deleted.

Section 17(15) was added to the Interstate Commerce Act by enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 ("the 4–R Act") (P.L. 94–210; 90 Stat. 31), specifically § 301 of the 4–R Act. As originally proposed in the House bill, H.R. 9802 (94th Congress, 1st Session), the proposed § 17(15) did not include the confidential documents exception. H.R. 9802 was succeeded, after extensive mark-up, by H.R. 10979 (49th Congress, 1st Session), which did contain the exception as presently worded in § 17(15). The Senate bills, culminating in S. 2718 (94th Congress, 1st Session), did not include a proposed § 17(15) of the Interstate Commerce Act, relating to Congressional access to information. So, while the Senate has not previously considered what is proposed in S. 263 at § 14(c)(5), the House, in the form of the Committee on Interstate and Foreign Commerce, has earlier considered the Congressional access to information provision without the exception and has rejected it.

The Interstate Commerce Commission has in its possession and continues to receive information and documents which may be characterized as "trade secrets and commercial or financial information of a privileged or confidential nature." Some of that information is supplied with full knowledge that it will not and cannot be divulged. But the proposal now is made in § 14(c)(5) of S. 263 that such information will no longer be considered confidential. The AAR asks only that "where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations." (House Report No. 1497, May 9, 1966, on confidential materials exception to the Freedom of Information Act).

The Association of American Railroads respectfully requests that the Interstate Commerce Commission be permitted to maintain the confidentiality of certain railroad documents and that § 14(c)(5) be deleted from S. 263, the Interim Regulatory Reform Act of 1977.

Sincerely,

HARRY J. BREITHAUPT, JR.,
Vice President and General Counsel.

THE SOUTHERN TRAFFIC LEAGUE, INC.,
CHATTANOOGA FREIGHT BUREAU, INC.,
Chattanooga, Tenn., April 27, 1977.

COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION,
U.S. Senate, Dirksen Office Building,
Washington, D.C.

GENTLEMEN: At its April 12 meeting the membership of the Southern Traffic League voted to express its opposition to this legislation.

The Southern Traffic League, Inc. has a membership of approximately 100 Southern shippers and receivers of freight within, from, and to this region. The purpose of the League is to obtain adequate but economical transportation service.

The League membership feels that Congress now has authority in many of the areas as covered by this proposed legislation. Opposition is also expressed to the provision that would prevent a former Commissioner for a two-year period from accepting gainful employment in the representation of any person before a regulatory body which he formerly served. The membership feels that this is unfair and that it could lead to a deterrent in securing for the various regulatory agencies the best qualified commissioners.

Please accept this as opposition to the proposed legislation.

Yours truly,

M. C. ELLIS,
Chairman, Legislative Committee.

GENESEE AND WYOMING RAILROAD CO.,
Clarks Summit, Pa., April 29, 1977.

Hon. WARREN G. MAGNUSON,
Russell Senate Office Building,
Washington, D.C.

Hon. JAMES B. PEARSON,
Dirksen Senate Office Building,
Washington, D.C.

GENTLEMEN: By majority vote, on behalf of the one hundred fifty-six members of the Eastern Traffic & Travel Association, Inc. and the three hundred ninty-four members of the Eastern Transportation Group Association representing all modes and many of the professions directly and indirectly involved in transportation, transportation regulation, education, law, the travel industry and the sciences, we would like to register our deep concern over the possible deregulation of the various modes.

S. 263 introduced by Senators Warren G. Magnuson (D,Wash) and James B. Pearson (R,Kans) unfortunately would set the tone for complete deregulation in the various agencies that presently control the nations commerce which, in the opinion of the majority, would have a disastrous effect on the transportation industry at large, i.e., air, rail, truck and maritime.

We do realize, as I am sure you do, that overregulation has had a serious and at times adverse impact on the ability of the verious modes to maintain sufficient stable financial resources to properly maintain, upgrade and develop and purchase new equipment and facility to meet modern standards and requirements today and for the future.

It is, therefore, the consensus of the majority of the membership of the two organizations, outlined above, that legislation such as S. 263 should be carefully researched to retain our existing system of checks and counter checks with an appropriate sense of balance. It is extremely doubtful that the alleged benefits derived from deregulation would bring about among other things, fifty percent fare reductions and continuing safe transportation between not only the high traffic density points but the probable elimination of sound schedule service on an inter-city basis on the less than lucrative routes serving the marginal smaller cities.

In the event that this type of legislation becomes law, it would be only a matter of time before deregulation of all modes at the expense of the tax payer, would occur. An objective review of all transportation legislation and regulation is desirable, if not mandatory. However, deregulation of our sphisticated systems wuld be a disaster and would not "facilitate the movement of people and goods."

Senate Bill 689 would again destroy our proven system of balance and counter balance. We would sincerely appreciate your assistance in preserving sound transportation legislation that would assist the industry and the traveling public rather than destroy its potential viability.

Respectfully yours,

JOHN N. KIEFER, Jr., *Administrative Vice-President.*

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 16, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science and Transportation. U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Enclosed for your reference is a copy of my response to a recent letter of Senator John Danforth on certain provisions in S. 263, the "Interim Regulatory Reform Act of 1977," regarding concurrent submission of budget requests and legislative recommendations to Congress and this office by the agencies covered in the bill.

It would be appreciated if this letter would be incorporated in the Committee's record on this bill.

Sincerely,

BERT LANCE, *Director.*

EXECUTIVE OFFICE OF THE PRESIDENT,
OFFICE OF MANAGEMENT AND BUDGET,
Washington, D.C., May 16, 1977.

Hon. JOHN C. DANFORTH,
Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR DANFORTH: Thank you for your recent letter regarding S. 263, the "Interim Regulatory Reform Act of 1977" as it pertains to the review by the Office of Management and Budget of budget requests and legislative comments of certain independent regulatory agencies.

At the time that agencies submit their budget requests to the Office of Management and Budget, their budgets are tentative proposals for the President to consider within the overall context of his domestic and foreign policy objectives. The President should be allowed to consider all of these suggestions, make his determinations according to his priorities, and then present a comprehensive, coordinated budget to the Congress for its consideration. The benefits of such a system have been recognized by both the Congress and the President and are the basis for the Budget and Accounting Act of 1921.

The basic problem with requiring agencies to submit their budgets to the Office of Management and Budget and Congress concurrently lies in the timing of the submission of budget information to the Congress. The budgets of individual agencies—including the independent regulatory commissions—have important relationships with those of other agencies and programs of the Government. Such relationships cannot be seen or evaluated until the entire budgetary picture is revealed when the President sends his budget to the Congress. Premature disclosure of individual agency budget requests could force the Congress to conduct a narrowly-focused, disjointed consideration of such requests.

The Office of Management and Budget supports the sharing of agency budget requests with the Congress after the President's Budget has been transmitted to the Congress. The heads of agencies may provide information concerning their budget requests to the President when the Congress asks for this information in connection with its consideration of the President's Budget. Additionally, provisions of the Congressional Budget and Impoundment Control Act of 1974 provide a statutory right of Congress to obtain the appropriate data and information which the Congress may need for its budgetary decisions.

Rather than encouraging procedures whereby Congress receives some agency budget information in a piecemeal fashion, we would urge instead that the President and the Congress continue to work together to develop ways in which the budget process as a whole can be improved. I look forward to our joint consideration of the possibility of instituting zero-base reviews of government programs and I anticipate that significant budget reform can be achieved through these efforts.

Similarly, the Office of Management and Budget's legislative review and coordination function is intended to assist the President (or his policy representatives) in developing and presenting to Congress a coherent, coordinated legislative program and coordinated views on pending legislation. Coordinatiton by the Office of Management and Budget of legislative proposals and positions by

the various agencies serves several important purposes for the Administration, individual agencies, and the Congress: (a) it provides a mechanism for development of a coherent legislative program for the President; (b) it encourages the various agencies to take the problems and concerns of other agencies into account; (c) it facilitates the development of a consistent Administration position on legislation; and (d) it assures that the Congress gets coordinated and informative agency views on legislation under consideration.

Moreover, legislative communications may be submitted to the Congress without prior coordination by this Office where time limitations do not permit such coordination to be achieved. As a result, agencies are not and have not been precluded from taking timely positions on legislation pending in the Congress.

We believe that both the President and the individual agencies benefit from this service and that all agencies should have access to it.

In summary, I believe that current provisions of law which provide for concurrent submission of budgetary and legislative items are unwise, that consideration should be given to repealing them, and that they should not be extended to additional new agencies.

Sincerely,

BERT LANCE, *Director.*

QUESTIONS OF SENATOR SCHMITT AND THE ANSWERS OF THE CIVIL AERONAUTICS BOARD

Question 1. To what extent does your agency have a complete cross-referenced catalog of regulations by subject matter, by requirements and by impact upon consumers, businesses and other agencies of Government? Are they readily available for public use and Congressional reference after they have been promulgated? How do you detect overlapping or inconsistent regulations in your agency and between agencies?

Answer. The Board's Rules are set forth in five parts: Economic Regulations, Procedural Regulations, Special Regulations, Organization Regulations and Policy Statements. The first two of these are of great importance to the air transport industry and the general public. There is in being a comprehensive (41 pages) alphabetical Subject Index to the Economic Regulations and a 23 page Subject Index to the Procedural Regulations. While there exists no specifically assigned cross reference to the rules by requirements or by impact upon consumers, businesses and other government agencies, the subject matter indices provide an effective means for quickly locating any desired material.

The indices have been published as part of the CAB Regulations and are distributed to all who subscribe to the service which provides updated and supplementary material. Copies of the indices are available without charge upon request.

Overlapping or inconsistent regulations are generally detected by the staff or by those, including other Federal agencies, who comment on proposed rules. Any overlap or inconsistency is eliminated prior to promulgation. Also, the General Accounting Office reviews all proposed rules containing record keeping or reporting requirements to avoid collection of data in possession of other agencies. In those few cases where an overlap or inconsistency is not recognized prior to promulgation, it is corrected quickly. The Board's staff, as well as many persons outside the Board who work closely with our regulations on a continuing basis, know them intimately. Few instances of duplicative or inconsistent regulations have occurred.

Question 2. To what extent are you required to include economic impact statements with proposed regulations? How do you determine whether the benefits will exceed anticipated costs to consumers?

Answer. The Civil Aeronautics Board, an independent regulatory agency, is not required ot include an economic impact statement with its proposed regulations.

The Board agrees that for any regulatory or other governmental action to be justifiable, its social benefits must exceed its costs. It is the fundamental duty of every decisionmaking governmental official, including this Board and the policy-recommending members of its staff, to consider this factor in determining the reasonableness of contemplated action. Although in many of the areas regulated by the Board, it is impossible to quantify, especially in advance, the relative costs

and benefits—to the public, the industry, and the Board—of adopting (or failing to adopt) a particular regulation, we attempt to use the best information presented in the proceeding, or otherwise available, to make a reasoned evaluation of costs and benefits.

Where it is possible that some element, particularly of cost, can be quantified, the Board receives comments on this point from those directly affected, even if not specifically solicited, to be analyzed in the weighing process that precedes a final decision. In the Fare Summaries rulemaking action, for example, (ER-979, 41 F.R. 55865, December 23, 1976, 42 F.R. 1220, January 6, 1977) The Board solicited and received detailed information from the air carriers on their projected costs for the summaries, which was highly useful in arriving at a decision.

Question 3. To what extent do you measure paperwork impact of regulations?

Answer. The Board does not generally undertake to make a separate evaluation of the "paperwork" impact of regulations. There appears to be no good reason to single out paperwork, among the various costs imposed by a government regulation, for special treatment. As discussed in response to question 2, all costs should be fully considered.

Furthermore, the concept of "paperwork" appears to be too vague for a statutory requirement. It is not clear whether it refers only to requirements for submission of information to the government, or also includes paper that is moved about internally within a company subject to the rule in question. The latter meaning, it should be noted, would probably be impossible for a government agency even to approximate. It is also unclear whether the concept refers to the time spent drafting a document per se, or the substantive activities whose final products appear on paper. For example, if a study is required by a government rule, would paperwork include the time spent on the study itself, or only the time spent drafting the report? Most of what businesses do today could in some sense (especially if electronically stored data is included) be considered "paperwork."

Question 4. To what extent do you determine the effect regulations will have on the courts' workload? Chief Justice Burger recently recommended "judicial impact" statements with new laws. What do you think?

Answer. The Board does not attempt to determine the effect of its regulations on the courts' workload. Generally, none of the Board's regulations are directed toward litigation. Most of the litigation in which the Board is involved is instituted by interested outside persons, challenging the validity of a rule or other Board action, or it consists of enforcement action brought by the Board against violators of its rules or the statutes it administers.

With respect to any proposal for "judicial impact" statements for new statutes, the Board would defer to the Congress' judgment as to whether this single factor should be specifically focused on in the legislative deliberations on each bill.

Question 5. Are you preparing to conduct zero-based budget reviews of your programs?

Answer. In keeping with the President's memorandum of February 14, 1977, asking agency heads to develop a zero-based budgeting system for use in preparing the 1979 Budget, the CAB is planning to conduct zero-based reviews of the Board's programs.

Question 6. What is your view of the "sunset" legislation calling for a phased 5-year schedule of review of federal program functions? Do you favor a "sunset" for agency rules and regulations?

Answer. While the Board would reserve the opportunity to comment upon the specifics of any bill involving "sunset" provisions, we would like to reemphasize our agreement with the basic objective of requiring a periodic review of the function, performance and value of ongoing governmental programs. As we noted

in a report to the Senate Committee on Government Operations last year on S. 2925, the Board "strongly supports the concept of regular, thorough and orderly Congressional oversight," although we were not in a position to state whether that particular piece of legislation would optimally implement this desirable objective. Similarly, we believe that Congress should ensure that any legislation it promulgates along these lines does not involve costs in funds, time and manpower resources which would outweigh the benefits of Congressional review in terms of better and more efficient regulation. We should mention, in this regard, that the several regulatory reform proposals now pending before the Aviation Subcommittee contemplate significant changes in the Federal Aviation Act and, if enacted, would satisfy the review requirements of any general sunset legislation with respect to the Board, at least in the near term.

The Board has taken no position in the past with respect to "sunset" for agency rules and regulations. As an initial reaction, it would seem that separate "sunset" legislation for agency rules would be redundant if the underlying statute is made subject to periodic reexamination, since change in the enabling statute would require concomitant revision of agency regulations. In this regard, we believe that sunset provisions for the Board's rules and regulations, if thought to be desirable, should be adapted to, and incorporated into, the regulatory reform legislation now before the Aviation Subcommittee, along with an appropriate and realistic schedule for completion of the reexamination of the Board's rules and regulations, consistent with the objectives and timetables of the basic reform legislation.

Question 7. There have been several bills and amendments to bills providing for a form of Congressional veto over proposed agency regulations. The budget reform law prescribes Congressional action in the form of recissions and deferrals of proposed impoundments. Please comment on the idea of applying the budgetary process to your agency's proposed regulations, that is, submitting major rules and regulations (that is, regulations having a substantial impact on consumers and businesses as opposed to minor regulations relating to internal agency matters and with little or no impact on outsiders) to the Congress for review before they go into effect.

Answer. The Board does not favor legislation which would create formal procedures for Congressional veto of agency regulations prior to the time they go into effect. Under current practice and procedure regulatory agencies such as the Board are subject to due process requirements, including public notice. Interested persons, including members of Congress, are given an opportunity to file comments concerning a proposed rule or regulation. Should the Board adopt any proposed rule or regulation over the objection of any interested person, that person has the right to challenge the rule in the courts. In our view, judicial review is an effective assurance that legislative policies will be executed. Since the determination of legal questions concerning Board rules, including whether a rule or regulation goes beyond the mandate of the agency's legislation or is otherwise contrary to law, are traditionally within the jurisdiction of the courts, the Board believes that Congressional review would be both redundant and inappropriate.

Moreover, Congress in any event retains full authority to monitor and to modify the Board's activities in the rulemaking field, through legislative oversight generally or through the passage of amendatory legislation, and has exercised its prerogatives in this regard in the past. Congressional review of each rule and regulation, on the other hand would result in further regulatory delay and create additional burdens upon agencies and the Congress at a time when delay has become a matter of concern, without significant material benefits in terms of improved Congressional oversight over the regulatory process. We also feel that it would be difficult in many instances to differentiate between "regulations having a substantial impact on consumers and business" and "minor

regulations relating to internal agency matters and with little or no impact on outsiders," and thus to lessen the overall burden. For these reasons, the Board would be opposed to legislation along the lines suggested by the question.

CIVIL AERONAUTICS BOARD,
Washington, D.C., April 14, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of April 7, 1977 requesting estimates of appropriation levels for the fiscal years 1978 through 1982.

For the Board's Salaries and Expenses appropriation, the estimates are as follows:

Fiscal year:

1978	$23,781,000
1979	24,899,000
1980	26,019,000
1981	27,190,000
1982	28,414,000

If any further information is required, we will be pleased to supply it.

Sincerely,

JOHN E. ROBSON, *Chairman.*

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., April 15, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of April 7, 1977, requesting estimates of authorization levels for five fiscal years beginning with Fiscal Year 1978.

In the testimony given on April 4, 1977, before your committee, our General Counsel, Mr. Hartenberger, stated our estimated authorization levels for Fiscal Years 1978 to 1980, as follows:

Fiscal year:

1978	$70,000,000
1979	74,000,000
1980	78,000,000

We prepared these estimates by starting with our Fiscal Year 1978 Budget Request to the Congress of $59,826,000, and added to it the dollar impact of four amendments we currently have pending at the Office of Management and Budget. We further adjusted upward our Fiscal Year 1978 estimate for the expected impact of the October 1977 pay increase.

Our Fiscal Year 1979 and 1980 estimates do not contain program increases but only our estimate of the impact of fixed cost increases such as General Schedule pay and office space rental. Following this latter approach, our estimated authorization levels for Fiscal Year 1981 and 1982 are:

Fiscal year:

1981	$82,000,000
1982	86,000,000

I regret the delay which occurred in our providing this information. Please call upon me if further information is needed.

Sincerely yours,

RICHARD E. WILEY, *Chairman.*

FEDERAL POWER COMMISSION,
Washington, D.C., April 15, 1977.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This responds to your request of April 7, 1977, wherein you asked for a projection of the Commission's authorization levels (budget authority) for the next five fiscal years, 1978 to 1982. This information is set forth in the table below.

Our fiscal year budget request of $42,785,000 is currently pending before the Congress. Added to this request and included in figures shown below are amounts estimated at 5½% to cover future pay raises through fiscal year 1982. The estimates do not include any other increases for personnel for new or expanded programs which the Commission may request up to fiscal year 1982 due to changing priorities or the energy situation.

Federal Power Commission budgetary projections—Fiscal year 1978 to fiscal year 1982

Fiscal year:	
1978	$44,549,000
1979	46,410,000
1980	48,373,000
1981	50,444,000
1982	52,629,000

I would like to reiterate the Commission's strong objection to any such legislated budget authorization levels as is currently proposed in S. 263, the Interim Regulatory Reform Act. In my letter of April 1, 1977 and in my April 4, 1977 statement before the Committee, I pointed out that limiting the Commission budget could seriously hamper our ability to function effectively and restrict our ability to respond quickly and effectively to unforeseen developments. Such limitations could also serve to inhibit regulatory reforms designed to reduce the burden on the regulated industries or to improve our procedures with respect to consumer interests.

If I can be of any further assistance in this matter, please let me know.

Sincerely yours,

RICHARD L. DUNHAM, *Chairman.*

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